OBSERVATIONS
UPON THE XVIII.
ACT
PARLIAMENT XXIII.
K. JAMES VI.
AGAINST
DISPOSITIONS
Made in defraud of Creditors, &c.

By Sir *GEORGE MACKENZIE*
of *Roſehaugh.*

The ſecond Edition, Corrected, and in ſeveral Paragraphs much Enlarged, by the Author himſelf; before his Death.

EDINBURGH,
Printed by the Heirs and Succeſſors of *Andrew Anderſon*, Printer to the King's moſt Excellent Majeſty. For Mr. *Andrew Symſon*; and are to be Sold by him, in the *Cowgate*, near the Foot of the *Horſe-wynd*. *Anno DOM.* 1699.

AT

EDINBURGH,

November 11. 1697.

THE Lords of His Majesties Privy Council being informed, that Mr. *Andrew Symson*, Merchant Burgess of *Edinburgh*, has caused Print the Books following, *viz.* A new Edition *of the Laws and Customs of* SCOTLAND, *in matters Criminal, by Sir* GEORGE MACKENZIE *of* Rosehaugh; To which is now added by way of Appendix; *a Treatise of the Crimes of Mutilation and Dismembration; and of* Retaliation *by which it is punished; wherein several Questions concerning that Subject are discussed.* Item a new Edition of the *Observations upon the Act Eighteenth, Parliament twenty Third, K.* JAMES *the sixth, against Dispositions made in defraud of Creditors, &c.* By the said Sir *George Mackenzie* of *Rosehaugh, Corrected, and in many Paragraphs much enlarged by the said* Sir George *himself.* The saids Lords do hereby grant sole Power, Liberty and Warrand, to the said Mr. *Andrew Symson*, or such Persons as he shall appoint, to Print, Vend, and Sell the saids two Books; And discharge all other Persons whatsoever to Re-print, Vend, Sell or Import any of the saids Books for the space of Nineteen Years, after the Day and Date hereof, under the Penalty of five hundred Merks, to be payed to the said Mr. *Andrew Symson*, or his Assigneys; by and attour the Confiscation of the saids Books to the said Mr. *Andrew*, for his use and behove. Extracted by me

GILB. ELIOT. *Cls. Sti. Concilii.*

ERRATA:

PAge 4. Line 1. *for* designed *read* dispon'd. *P.* 20. *l* 9. *f.* As *r.* And *l.* 25. *f.* quart *r.* tract. *P.* 22. *l.* 20. dele *h. t. P.* 24. *l.* 53. *f.* its as *r.* as it *P.* 25. *l.* 35. *f.* under *r.* that *P.* 28. *l.* 13: *f.* as is, *r.* as it is *P.* 41. *l.* 18. in some Copies *f.* Creditors *r.* Debitors *l.* 19. in some Copies *f.* Debitors *r.* Creditors. *P:* 49: *l:* 25: *f:* in all *r:* is all *P.* 49: *l:* 39. *after* Horning: *insert* for a Horning, *l:* 40: & 41: *dele* for a Horning *P:* 51: *l:* 23: *f: qui vincit me r: qui vincis vincentem me* l: 23: *f:* against me. *r:* against another. *l:* 24: *f:* against another, *r:* against me. *P:* 52: *l:* 48: *f.* for *r:* so *P:* 54: *l:* 18: *f:* in direct *r:* directed in *P:* 56: *l:* 21. *f.* a *r:* as *P:* 57: *l:* 5: *f:* Assysers *r:* Assisters *l:* 28: *f:* Canon *r:* Common *P:* 60: *l:* 8: *f:* for *r:* but As for Literal escapes which do not in the least mar the Sense, the Candid Reader is desir'd to excuse them.

TO

To the very
WORTHY, HOPEFUL, and INGENIOUS young *GENTLEMAN*,

GEORGE MACKENZIE of *Roſehaugh*,

Only Son and Heir to the Honourable

Sir GEORGE MACKENZIE of *Roſehaugh*, deceaſed;

Late Lord Advocat to King *CHARLES* II. and King *JAMES* VII. and one of Their Majeſties moſt Honourable Privy Council.

This ſecond Edition of the Obſervations upon the 18 Act. Parl. 23. K. *James* 6. *againſt Diſpoſitions made in defraud of Creditors*, &c. Corrected, and in ſeveral Paragraphs much enlarged by the Author, the ſame Sir *George Mackenzie* himſelf, before his Death;

Is with all due Reſpect humbly offered, by

(*Worthy Sir*)

Your moſt Humble Servant
in all Duty.

ANDREW SYMSON.

AN

AN

EXPLICATION

OF THE

ACT of PARLIAMENT 1621.

AGAINST

Bankrupts.

The Words of the Rubrick, or Inſcription of this *ACT*, are,

A Ratification of the Act of the Lords of Counſil and Seſſion, made in July 1620 *againſt unlawful Diſpoſitions, and Alienations, made by* Dyvours and Bankruprs.

FOR the better underſtanding of the Inſcription or Rubrick, it is fit to know, that the Word *Bankrupt*, which is the Tranſlation of the Latine *Banciruptor*, is in the Original but a barbarous Word, either derived from the French Word *Banque*, or the Italian *Banco*, and the Word *rumpere*: becauſe when Merchands became Bankrupts, they broke, either the Seat upon which they did ſit; or the bank or Table, at which they did ſit, as *Salmaſ.* obſerves, in *Pref. de uſur. pag.* 511. *& de fœn. trapezit. pag.* 36. But now the word *Banciruptor*, is taken not only, *pro menſulario, foro cedente*, but for any Merchand, or any other perſon, who has contracted more Debt, than he is able to pay, as *Vegnern* obſerves. *Page* 10. They are called likewiſe *decoctores, quia rem ſuam coquendo diminuunt. decoquere* ſignifying *diminuere*, *Bud. ad l. ſi hominem §. quoties ff. depoſit.* In *Italy* they are called *falliti, & ceſſantes*, *Boer. deciſ.* 215. But in the Civil Law the true Latine word is *fraudatores*; *l.* 4. *ff. de curat. bon. dand.*

They are likewiſe by this Rubrick called *Dyvour*, or *Dyour*; from the Iriſh word *Dyer*, as I conceive, which ſignifies a knave; and they are likewiſe called *bairman* in our Law, *l. burg. cap. bairman* 144. *&. de jud. cap. bairman* 46. Though our learned *Skeen* does in *de verb. ſignif. verb.* Dyvour, make Bankrupt to be the ſame with him who has obtained a *ceſſio bonorum, & qui bonis ceſſit*: Yet theſe differ very much, for a Bankrupt is he only, *qui foro ceſſit: ſed qui bonis ceſſit, forum retinet, & bona creditoribus in ſolutum dedit*, *Hottoman. de verb. ſig. verb. cedere: cedere foro eſt facti, cedere bonis eſt juris*, and he only who has loſt his eſtate by accident, without his own fault, was allowed *bonis cedere*; *banciruptor dicitur, qui dolo caſuve non ſo vendo factus eſt.* Vegnern. *p.* 21 How the word Bankrupt is taken in this Act, may be juſtly doubted, for by the Rubrick of the Act, it would appear, that this Act

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ſtrickes only againſt Diſpoſitions which are made by perſons inſolvent, and whoſe eſtate is not able to pay the debt due to the reducer; for the Rubrick of the Act bears, to be againſt Diſpoſitions made by Bankrupts or Dyvours: ſo that theſe two, are made *pares termini*; and therefore, ſince a Dyvour is a perſon who is inſolvent; it ſeems that this Act muſt only ſtrike againſt Diſpoſitions made by perſons that are inſolvent, *per argumentum à rubro ad nigrum*: for Lawyers are very clear, that where either the Rubrick is an intire ſentence, or where any term uſed in the Rubrick, is explained by any equipollent, or exegetick word, that there the general term which is dubious, is to be interpret according to the import of both theſe terms; and therefore, ſince the word Dyvour is only applicable to perſons inſolvent, the word Bankrupt muſt be likewiſe interpret only of theſe; and ſo the Rubrick running only againſt Diſpoſitions made by perſons that are inſolvent, it muſt follow, that only ſuch deeds are reduceable, as are done to the prejudice of Creditors by a perſon that is inſolvent. 2. This ſeems likewiſe conſonant to reaſon; for if the Creditor can recover his debt, he is not prejudged, and ſo the deſign of the Act fails; and it were moſt unreaſonable to trouble a perſon who has got a Diſpoſition, except there be an abſolute neceſſity. 3. This is moſt ſuitable to the common principles of Law, whereby *nunquam recurrendum ad remedium extraordinarium, quamdiu locus eſt ordinario*, no more than in Phyſick, a member ſhould be cut off where it can be cured; and therefore, a Creditor who may recover payment by ordinary diligences, ſuch as by the compryſing, or arreſting his Debitors Eſtate, ought not to be allowed to reduce all Diſpoſitions made by his Debtor, ſince *omnes actiones reſciſſoriæ*, and particularly *actio Paulina, ſunt remedia extraordinaria* whereby the Magiſtrate has been by cheats of Debtors, and the frau dulent Diſpoſitions of ſuch as contract with them, forced to reſcind and annull the privat pactions of parties, contrary to the ordinar and general principles. 4. This ſeems to be further clear, by the narrative of the Act, which runs only againſt Diſpoſitions which elude all execution of juſtice, whereby Creditors are defrauded of all payment, and many honeſt families come to utter ruine; neither of which expreſſions are applicable to the caſe of Creditors, who may recover payment otherwiſe: Nor can the Diſponer be ſaid to have deſigned, to defraud his Creditors who having diſponed only a part of his Eſtate, knew that he had ſtill a ſufficiency remaining to pay his Debt; And to reduce Deeds where there is neither *fraus ex parte dantis* nor *recipientis*, were to reſolve this Act of Parliament in an Interdiction or Inhibition, and to make a man abſolutely incapable, either to gratifie friends, or provide Children, though his Eſtate were never ſo opulent. 5. If this were ſuſtained, it would alſo follow, that tho' the Diſponer had a ſufficient Eſtate at the time, yet if *ex eventu* he became Bankrupt at any time, all rights made by him without an onerous Cauſe, ſhould be null, and ſo the negligence of the Creditors for onerous Cauſes, ſhould prejudge thoſe who were alſo true Creditors, though for gratuitous Rights, which were unjuſt. But on the other ſide, it is urged, that albeit the fraud of Bankrupts, gave occaſion to the Act, yet the true deſign of it was to debar Debitors from alienating any part of their Eſtate in prejudice of their juſt Creditors, and accordingly it is declared, that the Lords will decern all Alienations and Rights made by the Debitor to any conjunct perſon without true, juſt and neceſſarie Cauſes, and without a juſt price really payed; The ſame being done after contracting of Debts from prior Creditors, to be null without farder Declarator, and the Act does not bear that all Rights made by Bankrupts ſhould be null. 2. If the Act had run in theſe termes, it had been very uncertain, and had left the Matter very Arbitrary, for it might have been frequently doubted who could have been called Bankrupt. 3. If the receiver of the poſterior gratuitous Right might prevail

to

to get the same sustained, by proving that the Debitor was solvent the time he granted that Right, then the prior Creditor would be obliged, to expiscat the condition of his Debitors Estate which would be both very difficult for a Stranger, and too expensive to be put upon a true Creditor. 4. If there were any loss to be sustained *ex eventu*, it were far more just that the same should fall on conjunct and confident persons who have got a part of the Estate without an Onerous Cause, than on Strangers who have become Creditors *ex causa onerosa*. 5. By the Civil or Common Law to which this Act of Parliament relates, all Deeds done in defraud of Creditors are absolutely null, for by that Law this just Distinction was observed, *viz.* That if the second Right was made for a lucrative Cause it was revocable without considering whether the receiver was *particeps fraudis* if upon the event the Creditors were defrauded but in *titulo oneroso requiritur & fraus danti & accipienti*, And so there was no necessity of discussing whether the Debitor was solvent, *l.* 6. §. 11. *ff. l.* 5. *eod. h.t.* 10. §. 1. *h. t.* and *l.* 79. *ff. de reg. juris. vide Ferrier La juris prudence du digest. p.* 479. And if the second Disposition be for an Onerous Cause, the Creditor seems not to be prejudged, for the price or Onerous Cause comes in place of the thing alienated and the Creditors may affect the one as well as the other, *Bargalus de dolo p.* 635: *Num*: 25. *Bartolus in l. qui a debitore ff. qui in fraudem Creditorum*, But there is a greater reason for it by our Law, than by the Civil Law, for our Law having only reduced such deeds as were made to Conjunct and Confident persons without an Onerous Cause; It is much juster that Conjunct persons should suffer than any else if there be not sufficiencie of Estate *ex eventu* to pay such as were prior Creditors for an Onerous Cause. The Lords in their Decisions upon this point have inclined to sustain even Donations in favonrs of Conjunct persons, if the granter of the Right had sufficiencie of Estate out of which the prior Creditors for Onerous Causes might be payed and thus they decided 11 *March* 1624. tho' *Haddingtoun* declares himself of a contrarie Judgement the Bond being made there in favours of a Brother in Law; and 6 *March* 1632 *Garthland* contra *Ker*, where the Disposition was made in favours of a Grand-child; and the same was sustained betwixt the Husband and his Wife and her Sister, tho a very eminent Lawyer who observed the Decisions has argued strongly against it, and declared his Judgement in favours of the Creditors 30 *June* 1675 *Clerk* contra *Stewart*. And in the case betwixt the Children and Creditors of *Mouswel* the Lords sustained Provisions made to Children, because the Father had a personal Estate tho the Creditors were not oblidged to know the same, and because he had a Wood standing upon the Ground, but whatever may be said in favours of a Conjunct person getting a Donation, where the Disponer has a visible Estate, the time that the Reduction is craved, far beyond the value of the Debt persued for, so that the prior Creditor for an Oneros Cause can suffer nothing; yet I would incline to reduce all Gratuitous deeds made in prejudice of prior Creditors in favours of Conjunct and confident persons in these cases following.

1. If *ex eventu* the Creditor could recover no payment though there was sufficiency of Estate the time of the making the right, for certainly the design of the Act was to secure the Creditors against gratuitous Rights, and its much juster that conjunct and confident persons should lose, than meer Strangers who were prior Creditors for an Onerous Cause, nor is it absurd that though this Disposition might have been sustained at the beginning because there was a very opulent fortune then, it should yet thereafter become null, for many Rights become null *cum deveniunt in causam a qua incipere non poterint*, a clear instance whereof we have in our Law, in the case of Waird-lands, for tho a Disposition and alienation of the lesser half of the Waird tenement will not infer recog-

nition, yet if *ex poſt facto* the greater half be thereafter deſigned, then the Lands ſold as the leſſer half will alſo fall under Recognition. 2. Except there remain far more than is able to pay the prior Creditors even though for a lucrative Cauſe, I think the Right made to conjunct and confident perſons ſhould be reduced, for ſuch Reductions are ſuſtained at the inſtance of prior Creditors, tho' they be only Creditors *ex cauſa lucrativa* as ſhall be thereafter cleared: And it ſeems reaſonable that there ſhould be ſome diſtinction made betwixt prior Creditors who are ſuch for onerous Cauſes, and thoſe who became Creditors by meer Donations; The prior Creditors for Onerous Cauſes being ſtill more favorable. 3. It ſeems hard to put ſuch as were prior Creditors for onerous Cauſes to debate what was the Condition of their Debitor at the time he made the Diſpoſition; And therefore to prevent the arbitrarineſs, this Act of Parliament ſeems to have declared, all Deeds made to conjunct and confident perſons without a true onerous Cauſe, null at their inſtance, and certainly it is a prejudice to them to have any part of the Eſtate that might be affected by their diligence, ſubſtracted from it and given away by a meer Donation, and all rights are reduceable which are made to the prejudice of Creditors, nor makes the Law a Diſtinction whether the prejudice be great or ſmall, nor could Limites be ſet againſt Arbitrarineſs, if ſuch a Diſtinction were allowed. 4. It were moſt abſurd to ſuſtain Deeds done to the prejudice of prior Creditors for Onerous Cauſes, becauſe the Diſponer had a perſonal Eſtate, or other latent Rights which Creditors could not well know, and as there is no Obligation by the Act of Parliament upon Creditors to do diligence, againſt the common Debitor, and conſequently it cannot be objected to them that they have not done Diligence; ſo why ſhould it not rather be objected againſt thoſe poſterior Creditors by Donation, that they did not diligence againſt that perſonal or other Eſtate, for either they knew the Debitor had ſuch an Eſtate or not, if they knew he had it they might have affected it, and if they knew it not they cannot defend themſelves in having taken the poſterior Donation upon the pretext that the Diſponer had an Eſtate *aliunde* ſufficient to pay his prior Creditors.

Our Soveraign Lord, with advice and conſent of the Eſtates: The legiſlative power of *Scotland* conſiſts in the Parliament, that is to ſay, the King and three Eſtates of Parliament; and though ſome think it more proper in our Law to ſay, *Our Soveraign Lord, and Eſtates of* Parliament, as in all the Statutes, or Acts of the 18. *Par. Ja.* 6. than to ſay, *Our Soveraign Lord, with advice & conſent*, &c. yet conceive, the King Statutes, & they but conſent, (though their conſent be neceſſary) for his touching them with the ſcepter, and not the being voted, makes them Laws; and in *England*, the King ſtatutes with conſent of Parliament, and upon their ſupplication, and therefore I underſtand not *Craig.* who *Diag.* 8. affirms Statutes to be *conſtitutiones trium regni ordinum, cum conſenſu Principis*: for that is juſt to invert the ſtatutory words of this, and many other Acts. Our old Acts being all paſt the laſt day of the Parliament, did not expreſs the ſtatuting power in every Act; for in effect they were all but branches of one Act, and run, *Item that* &c. and many of theſe Acts bear, *It is ſtatute by the* Parliament, *and the King forbids*, as Acts, 13. 14. 1. *Par. Ja.* 1. which Intimats, that though the Parliament ſtatutes *ſuffragando & conſentiendo*, yet the King only doth ſtatute *ſanciendo & prohibendo*. Sometimes our Acts bear, *It is Statute by the hail* Parliament; and ſometimes, *It is ſtatute & ordained*, without mentioning either King or Parliament; ſometimes alſo they bear the determination of Parliament, without ſpeaking of the King, which was either where the King was to perform what was ſtatuted, as 23. Act, *Pa.* 1. *Ja.* 1. *It is Statute and Ordained, that our Soveraign Lord ſhall gar mend his money*, And by the 6. Act, 3. *Par, Ja.* 2. *The Eſtates has concluded, that the King ſhall ride thorow the Realme*; or elſe when the Eſtates are only to grant

what

what is ſtatuted, as in Commiſſions granted for uniting the two Kingdoms. But I find one Statute bear, the King ſtatuting without mentioning the Eſtates of Parliament, *viz.* Act 19 Seſſ. 1. Pl. *Ch.* 2. but this is but meer inadvertencie.

Ratifies and Confirms an Act of the Lords of Seſſion, &c. This was originally an Act paſt by the Lords of Seſſion, when they do ſit Judicially, at which time it is marked in their Books of *Sederunt*, ſuch and ſuch Men did ſit. Thus the *Hebrews* deſigned the Books of the Old Teſtament, by the firſt Words; and thus we ſtill mark the Laws from the firſt words; and thus the old Books of our Law are called *Regiam Majeſtatem*, becauſe they begin ſo.

His Majeſty, at the firſt Inſtitution of the Colledge of Juſtice, did allow the Lords of Seſſion *to conclude upon ſuch Rules, Statutes and Ordinances, as ſhall be thought by them expedient to be obſerved and keeped in their manner and order of proceeding, at all times, as they deviſe, conform to Reaſon, Equity and Juſtice, His Grace ſhall Ratifie and Approve the ſame.* Theſe are the Words of the 43. Act, 5. *Parl. Ja.* 5. To the which Act, I think this Act relates: but it would appear, both by that Act, and by the Power as here repeated, that the Lords of Seſſion have only Power to make Orders relating to the Regulation of their own Houſe, and to the Forms of Proceſs. For this was indeed neceſſary for Explication of their Juriſdiction, and poſſibly was implyed in their very Conſtitution, without any expreſs Warrand: *arg. l. 2. ff. de juriſdict.* But it ſeems that this general Power cannot authorize them to make Statutes, and Acts relating to the material Diſtribution of Juſtice; ſuch as, that all Writes ſhould be null, except ſubſcribed before Witneſſes, though they might have ordained, that Papers under the Hands of their own Clerks, ſhould be ſo ſubſcribed: for if they could make Statutes, as to any thing elſe beſides the Forms of their own Houſe, there needed no Parliament; for their Statutes might bind all the People in all things; And yet it may be objected, that by this Argument the Lords of Seſſion could not have made this Law, declaring Contracts amongſt the Leidges, to be null; that touching upon one of the Fundamentals of humane Society, albeit they might have declared ſuch a Nullity, receivable by way of Exception, for that concerned only Form of Proceſs. But the Anſwer to this is, that the Lords, in making this Act, did not introduce *ius novum*, a new Law; but only adapted to our Practice, the old Roman or Civil Law, which they might have followed in their Deciſions, without making any new Act of *Sederunt*, as they do in moſt caſes where the Civil Law is founded upon Equity; as here; and where they are not determined by either our former Practice, or Conſtitutions; and by the ſame principle, both the Lords of Seſſion, and the Parliament did in this Statute declare, that their ſaid Act ſhould extend to Cauſes depending, or to be intented: whereas Statutes regularly are extended only to future caſes; except where the Act declares what was Law formerly, as in this caſe.

We may then conclude theſe Differences betwixt theſe Acts of *Sederunt*, and Acts of Parliament, that Acts of *Sederunt* can only be made concerning the Forms of Procedure, or to fix a conſtant Deciſion for the future, in caſes which they might have ſo decided, before their own Act: And it is their Prudence, and our Happineſs, that they ſhould rather decide in *Hypotheſi*, than in *Theſi*. But Acts of Parliament ſhould mainly be made to regulat new ſubſtantial Grounds of Juſtice and Commerce. But though this power of making Orders for adminiſtration of Juſtice, be properly, and principally their Province, yet they have in this but a cumulative Juriſdiction with the Parliament, who may & do likewiſe make ſuch Orders, but the Parliament ought to do ſo ſparingly, ſince Forms are better known to the Lords of Seſſion, than to them and therefore, it ſeems that the power of making Acts relating to Forms, or of regulating Forms already made, belongs particularly to the Lords of Seſſion, both becauſe of their Conſtitution, and Experience. The Lords have been

in uſe not only to regulat their own Court by Acts of *Sederunt*; but they have by the ſame power preſcribed Regulations to other Courts, and thus as to the Juſtice-Court in *anno*, 1591. years, they made an Act, that Women, and *ſocii criminis*, might be received Witneſſes, in caſes of Treaſon: and we find that they have likewiſe regulated inferior Courts, without any previous Warrand, as is clear by the 19. Act, 23. *Par. Ja.* 6. where the Parliament ratifies an Act of Secret Council and Seſſion, which did Ordain and Command, that no Proceſs ſhould be granted before inferiour Judges, on the firſt Summonds, but upon libelled Precepts, and Citations of fifteen days warning, And in *anno* 1636. they made an Act of *Sederunt*, appointing, that no Conſent of any Inferiour Court ſhould bind the Conſenter, except it were ſubſcribed by himſelf, and that the Aſſertion of the Clerk of that Court was not ſufficient. Nor ſhould this Extention of their Power ſeem unwarrantable; for, ſince they may reduce the Decreets of Inferiour Courts, it ſeems moſt Conſequential, that they may regulat their Procedure: But though the Lords of the Seſſion paſs the Bills before the Juſtices, and advocat Cauſes from before that Court, it may ſeem ſtrange, that they ſhould have power to make Acts of *Sederunt*, for regulating that Court, the Juriſdictions *Civil* and *Criminal*, being moſt diſtinct and different.

It may likewiſe ſeem, both by the former Act allowing the Lords of the Seſſion this power, and the Ratification of their Statute ſpecified in this Act, that it is neceſſar, that all the Acts of *Sederunt*, which relate not meerly to the regulating their own Forms, ſhould be ratified by the Parliament, though in the interim of Parliaments, theſe Acts ſhould bind. And yet, *de facto*, we ſee very many Acts of *Sederunt* to have full Vigour, and Force, without any ſuch Confirmation.

Before I begin to explain the Words of the Act of Parliament, I ſhall offer this Analyſis of it.

Either the Creditors who are defrauded, are ſuch Creditors as have done no Diligence, or ſuch as have done Diligence: if they be ſuch as have not done Diligence, then either the Diſpoſitions quarrelled are made to conjunct perſons, or not; if they be made to conjunct, or confident perſons, either they are made for neceſſary and onerous Cauſes, or not; if they be made for a neceſſary and onerous Cauſe, they are valid, though made to conjunct or confident perſons. 2. If theſe Diſpoſitions be made without an onerous Cauſe, then either they remain with the conjunct or confident to whom they were made, or not; if they remain with him, they are reduceable, either by way of exception, or reply. But if any third party, no way partaker of the fraud, has lawfully purchaſt any of the Bankrupts Lands, for a juſt and true cauſe, then the Right is not quarrelable, but the receiver is only lyable to make the ſame forthcoming to the Bankrupts true Creditors. 3. The fraud is probable by writ, or Oath of the party receiver. 4. If the Creditors have done diligence by Inhibition, Horning, *&c.* Then the Bankrupt cannot in prejudice of theſe Creditors who have done diligence, diſpone voluntarily any part of his Eſtate to defraud that diligence, in favours of another concreditor, who has done no diligence, or poſterior diligence, or in favours of any interpoſed perſon to their behoof. And in this part of the Act, it is not conſidered, whether the interpoſed perſon be a perſon conjunct, or not. 5. The Bankrupts, the interpoſed perſons, and all ſuch as have aſſiſted them, in adviſing, or practiſing theſe frauds, are declared infamous.

Conform to the Civil and Canon Law, &c.

BEcauſe the Act of Parliament and Act of *ſederunt* bear, that they have in this Act followed the Civil and Canon Law; We may juſtly aſſert that it were fit the Lords of Seſſion underſtood exactly the Civil Law, and that it is the great foundation of our Laws and Forms. Thus we ſee, that *Robert Leſlies* Heirs, are by the 69. Act, Parl. 6. K. *Ja.* 5. ordained to be forefaulted for the Crime of treaſon committed by their Father, according to the Civil Law; and forefaulture in abſence, was allow'd by the Lords of Seſſion, in *Anno* 1669. becauſe it was conform to the Civil Law: and falſhood is ordained to be puniſhed, according to the Civil and Canon Law, Act 22. Par. 5. Q. M. And that the Civil Law is our rule, where our own Statutes and Cuſtomes are ſilent, or deficient, is clear from our own Lawyers, as *Skeen, Annot. ad l.* 1. *R. M. c.* 7. *ver* 2. and by *Craig, l* 1. *Diag.* 2. As alſo from our own Hiſtorians, *Leſly, l.* 1. *cap. leg. Scotor. Boet. l.* 9. *Hiſt. Camer. de Scot. Doct. l.* 2. *cap.* 4. And the ſame is recorded of us by the Hiſtorians and Lawyers of other Nations; as *Forcart. lib* 7. *de gal. imper. Polid. lib.* 1. *Hiſt. Angl. Petg. di amitis Geograph. Europe tit. di Eſcoſſe*: and *Duck, de auth. jur. civ. lib.* 2. *cap.* 10. And though the Romans had ſome cuſtoms or forms peculiar to the Genius of their own nation: yet their Laws, in undecided caſes, are of univerſal uſe. And as *Boet.* well obſerves, *Leges Romanas à Juſtiniano collectas tantâ ratione & ſermonis venuſtate eſſe, ut nulla ſit natio tam fera vel ab humanitate abhorrens quæ eas non fuerit admirata.* And K. *Ja.* 5. was ſo much in love with the Civil Law, as *Boet.* obſerves, *lib.* 17. that he made an Act, that no man ſhould ſucceed to a great Eſtate in *Scotland*, who did not underſtand the Civil Law, and erected two profeſſions of it, one at St. *Andrews* and another at *Aberdeen*; and when K. *James* the firſt did by the 48. *Act*, 3. *Parliament*, ordain, that his Subjects ſhould be governed by no foraign Laws, he deſigned not to deny the reſpect due to the Roman Laws, but to obviat the vain pretences of the Pope, whoſe Canons and Conceſſions were obtruned upon the people, as Law, by the Church men of theſe times.

It is alſo fit to know, that by the Civil Law many remedies were provided to ſecure Creditors againſt the cheats of their Debitors: As firſt, *Actio Pauliana*, ſo called either from *Paulus* the Prætor, who did introduce it, or from *Paulus* the Lawyer, who did firſt adviſe it; by which Action Creditors might recall either the Eſtate moveable, or immoveable, diſponed by their Debitor to their prejudice. 2. *Actio in factum*, by which *bona incorporalia*, ſuch as *jura, & ſervitutes*, were recalled, when alienated, *l.* 14. *ff. quæ in fraudem creditorum.* 2. *Actio faviana*, whereby Patrons might revoke that which was done by their freed men, to the prejudice of that fourth part or *legitim* which was due to them by the Law. 4. *Actio faviana utilis*, by which Minors who were adopted or arrogated, might revoke what was done in prejudice of their fourth part due to them. But though *Sneawine* calls this *utilis faviana*, yet it is a miſtake; for *Hottoman, Gomezius*, and others, do much more properly make this a *ſpecies Actionis Calviſiana*. 5. *Actio Calviſiana*, which was granted indifferently to Patrons and others. 6. *Edictum fraudatorium*, which was competent, when the Creditor was to revoke what the Debitor had alienated, and which belonged to another, and not to himſelf: as if a Tutor had alienated the goods belonging to his Pupil, which Pupil, and not himſelf, was Debitor.

The Action competent by the Civil Law, was called *Actio revocatoria*, ſo called, becauſe the Judge revoked what was done; and with us it is called an Action of Reduction, becauſe the deeds ſo done are reduced or reſcinded: And I find the word Reduction uſed by Civilians even in this ſenſe, as by *Panormitan*, *Concilio ſecundo*, and others. And *reducere* does properly ſignifie *in formam priſtinam inſtaurare*, as is clear by *Ulp. l. 3. ff. de Itin. act. privato* §. 15. And therefore we have elegantly called this an Action of Reduction, becauſe the Judge was to reſtore the things alienated in prejudice of the Creditor to its former condition, whereas the Reduction of Decreets was a term unknown to the Civil Law, they uſing only Appeals, and Reviſions; but Reductions of Sentences is uſed amongſt the Doctors, even in the ſame term and ſenſe that we uſe it, as is clear by *Gail. lib.* 1. *obſerv*, 149. *&* 150. And the reaſon why it was neceſſar for Lawyers to introduce the neceſſity of ſuch Reductions, or Revocations, was, becauſe in the ſubtility of Law, the alienation did *ipſo jure transferre Dominum. l. ſi. ſciens ff. de contra empt.* And therefore it is that if ſuch Reductions be not raiſed before the years of Preſcription, the Alienation it ſelf is valid, though within that time it might have been reſcinded by this Action of Reduction.

Though this Statute only declares all Alienations, Diſpoſitions, Aſſignations and Tranſlations whatſoever made by the Debitor, of any of his Lands, Teinds, Reverſions, Actions, Debts, or Goods whatſomever, to be null; yet this is extended to Bonds granted, and to Tacks ſet by the Debitor, to the prejudice of his Creditor: for though neither Tacks, nor Bonds, be comprehended under the Letter of the Law, yet the ſame Parity of Reaſon, extends the Act to them; and in Laws which are founded upon the Principles of Reaſon, extenſions from the ſame Principles are very natural, and in Laws which are introduced for obviating of Cheats, extenſions are moſt neceſſary, becauſe the ſame ſubtile and fraudulent Inclination which tempted the Debitor to cheat his Creditors, will eaſily tempt him likewiſe to cheat the Law, if the Wiſdom and Prudence of the Judge did not meet him wherever he turned. And this is one of theſe Laws wherein the particulars ſpecified, are ſet down rather as Examples than as Reſtrictions; and generally where the reaſon of the Law is expreſſ'd, that Law is to be extended to all the particulars to which the Reaſon expreſs'd in the Law can reach, and the particulars are conſidered but as Examples and not as Reſtrictions unleſs there be ſome ſuch taxative particle added as, *only*, *allanerly*, &c. which Rule holds beyond all Contraverſies *in favorabilibus* ſuch as this Act is, which is made to obviat Cheats and Frauds, but it has been doubted whether the ſame ſhould hold *in correctoriis & pœnalibus*, as the 2. *Act.* 9. P. K. *J.* 6 where becauſe Forefeited perſons are preſumed to abſtract their Writs and Evidents, therefore it is declar'd that the King ſhall not be oblig'd to produce Diſcharges for by paſt years: but ſeing, that the Act of Parliament, ſpecifies only the Caſe of Preſentations, by which Lands holding of mediat Superiors are expreſs'd, therefore it is doubted, and not yet decided, whether a perſon who has right to an Infeftment of Annualrents holding immediatly of the King out of the ſaids Lands can be excluded from bygone Annualrents, though the Reaſon of the Law extends, as ſtrongly to theſe, as to Lands or Annualrents holding of other Superiors, in which caſe the King only preſents. And even where the Reaſon is not expreſs'd in the Law, our Deciſions extend the ſame *ex ratione conjecturatâ*, *licet non expreſſâ*; *& ex paritate rationis*, as in the 29. *Act.* 5. P. *Ja.* 3. whereby Bonds and ſeveral other perſonal Rights therein enumerated, are ordained to preſcribe in fourty years, which is extended to Decreets and Teſtaments. And by the 17, *Act* 6. P, *Ja.* 2. Tacks of Lands ſet in favours of poor Labourers of the ground are ſecured againſt ſingular Succeſſors, which is extended to Tacks of Salmond-fiſhing, and to Tacks of all o-

ther

other Caſualities. But yet Bonds, in ſo far as they are perſonal, do not prejudge the Creditor, nor fall they under this Statute: but only in ſo far as they tend to, and may be the ground of legall Alienation, by Comprizing, Poynding, or other diligence to the prejudice of the Creditors, and by affecting the Debitors Eſtate. By the word *Alienation*, is meant not only an expreſs transferring of the Right, but any Act, whereby the *dominium* or Property is looſed to the Debitor, as if the Debitor ſhould in prejudice of his Creditor, *habere rem pro derelicto ut alius eum occupet*, if he ſhould relinquiſh any thing, upon deſign, that a conjunct or confident Perſon might poſſeſs it. Diſcharges likewiſe by the Debitor, of a Right competent to him, are reduceable upon this Act of Parliament, though the word *Diſcharges* be not expreſt in the Act, for by the common Law, *Competebat Pauliana, quando Creditor liberabat Debitorem ſuum acceptilatione vel per pactum de non petendo.* Wherein *l.* 1. §. 2. *ff. h. t.* agrees with *l.* 5. *Baſil.* η απρονοητον τι εποιησεν.

I doubt not but upon the ſame parity of reaſon, if a Debitor ſuffered a Decreet to go againſt him, *doloſe*, and connived ſo far in prejudice of his Creditor, as to omit a competent defence; but the Creditor might reduce that Decreet upon this Act of Parliament, if he could inſtruct the connivance and colluſion, and verifie the defences that were omitted, but without this colluſion were clearly inſtructed, it were very hard to reduce a Decreet at the inſtance of a party, who needed not to have been called.

I likewiſe think, that if the Debitor ſhould in prejudice of his Creditor ſuffer the term to be circumduced againſt him for not compearing to depone, that Decreet were likewiſe reduceable: And this was ſo found at the inſtance of *Marjory Halyburton* contra *Moriſon*, where though *Moriſon* was a ſingular Succeſſor, and had got an Aſſignation to the Decreet obtained by colluſion againſt *Watte*, by his Brother, yet the Lords ordained Witneſſes before anſwer to be led for proving the colluſion, and reponed *Watte* to his oath, and ordain'd him to depone. But the difficulty there would be, how a Debitor could be compelled to ſwear; and I doubt not but in this caſe if the colluſion were offered to be proven by the oath of him who obtained the Decreet, that the Decreet would be reduced though the Debitor compeared not to depone: or if the Creditor purſued him, that *eo caſu* he would be forced to depone, and that if he refuſed, perſonal Action would be obtained againſt him, *l.* 3. §. 1, *h. t.* which allows Action to the Creditors, *Si data opera ad judicium non venerit* η επιτηδες εκ αλθεριας διαλειπων.

Upon the ſame reaſon alſo, if my Debitor ſhould by colluſion prejudge his marches by a tranſaction, meerly to prejudge me who was to ſecure his Eſtate to my ſelf by a diligence for my Debt; this tranſaction might be quarrel'd, as done in defraud of me his Creditor, which agrees with *l.* 23. *Baſil. h. t.*

It is much debated amongſt the Civilians, whether he is ſaid to alienat in prejudice of his Creditors, who refuſes to acquire an Eſtate that he might acquire, to the advantage of his Creditors: As for inſtance, if he refuſed to accept of a Legacy, or to enter Heir: it would appear to me, that by the common Law, *Actio Pauliana* extends not to theſe caſes, as is clear *per l. quod autem ff. quæ in fraud qui autem cum poſsit aliquid quærere, non id agit, ut acquirat ad hoc edictum non pertinet & §. 2. proinde & qui repudiavit Hæreditatem vel Legitimam vel Teſtamentariam non eſt in eo caſu ut huic edicto locum faciat.* And the ordinary diſtinction allowed by the Doctors in this caſe is, that *aut agitur de jure delato & quæſito, & hoc debitum quæſitum Creditor repudiare non poteſt, aut agitur de jure non delato, aut ſaltem nondum quæſito licet delato, & non prohibetur illud repudiare.* But yet this deciſion of the Civil Law ſeems unreaſonable, for ſince the Law was to ſecure Creditors, it was juſt that it ſhould have ſecured them againſt all frauds, and what fraud is more malicious, than to ly out of an Eſtate by which the Creditor might be payed: or not to fulfil a condition, by

the fulfilling whereof, they might be put in a capacity to paytheir Debt. And therefore our Law has much more juſtly by the 106. Act 7. *Par. Ja.* 5. allowed, that the Creditor may charge his Debitor to enter Heir, whereupon the Eſtate may be appriſed from the appearand Heir, in the ſame way, and maner, as if he had entred Heir.

As alſo, by our Law, if a Legacy were left to my Debitor, and he deſigned to ly out of it meerly to prejudge me, who am his Creditor; yet our Law would ſecure me againſt this malice, either by allowing me to arreſt the Legacy left in the hands of the Executor, if the Executor did confirm that Teſtament wherein my Legacy was left, and ſo I might eſtabliſh a right to the ſaid Legacy in my own perſon, by a Decreet to make furth-coming; or if the Executor ſhould refuſe or decline to confirm the Teſtament; I, the Legators Creditor might confirm a third perſon *Executor dative*; and ſo in *omnem eventum*, ſecure my ſelf againſt the fraud deſigned by my Debitor. But they are in a miſtake who think that I could have confirmed my ſelf *Executor Creditor* to the *De*funct, for the Defunct was not my Debitor, though he left a Legacy to my Debitor. The queſtion is yet harder with us, in conditional obligations, whereof I ſhall give two inſtances; one is, if by contract betwixt my Debitor and *Titius*, *Titius* were obliged to pay my Debitor 5000 merks; and upon the payment thereof, my Debitor were obliged to confirm *Titius* as his Vaſſal, but my Debitor finding that the ſaid 5000. merks would accreſs to me, ſhould upon that head decline to fulfil. The queſtion is, how could I ſettle in my own Perſon a right to the ſaid 5000. merks? And it is thought that the proper way were to compriſe from my Debitor, that right by which he could have confirmed *Titius*; and having thus put my ſelf in a condition to fulfil the condition upon which the 5000 merks was payable, I could either arreſt the money in *Titius* hand, and force him to make it forth-coming or elſe purſue an ordinary action againſt him, wherein I would conclude that he being obliged to pay 5000 merks to my Debitor, upon obtaining a confirmation from him, ſhould be now decerned to pay me the ſaid 5000. merks as having come in place of his ſaid Creditor, by having compriſed his right and ſo being capable to perform, and fulfil the condition whereupon the ſaid 5000 merks was payable. But its thought that the laſt part of the Alternative will not hold, *viz.* that there may be a perſonal Action for payment; and that becauſe, albeit the Creditor having compriſed the right whereupon he may confirm, may fulfil the condition, yet he cannot have right to the conditional obligation, ſo that he may purſue for payment. unleſs it be ſetled in his Perſon by compriſing, arreſtment, or ſome other legal diligence.

The ſecond caſe is, if *Titius* be obliged to pay my Debitor 5000 merks, upon condition that my Debitor ſhould build him a Houſe: The queſtion is, how I, if my *De*bitor be unwilling to fulfil, can eſtabliſh a right to the ſaid ſum in my own Perſon.

To vvhich it may be anſwered, that either my Debitor was obliged expreſly by way of mutual Contract, to build the ſaid Houſe to *Titius*: And then ſome think, that I may force *Titius* to Aſſign me to the Contract, and thereby I will force my Debitor to fulfill his part; but yet I ſee not how he may be forced to aſſign me, or from what that Obligation can be inferred. Others think, that I may arreſt, and if when I purſue to make forth-coming, *Titius* ſhall alledge that he cannot pay until the condition be fulfilled. I may eleid that Allegeance by this Reply, *viz. ſibi imputet*, that he did not obtain the Implement of that Condition by regiſtrating the Contract, and forcing my Debitor to fulfil. But I think the foreſaid Reply, *ſibi imputet*, would not be relevant, ſeing the Debitor is ſecure; and it cannot be imputed to him that he did not purſue for implement, and as the Creditor of the conditional Debitor

bitor would not be heard to ſay *ſibi imputet*, ſo this Creditor who can be in no better caſe; cannot reply upon *ſibi imputet*.

But if my Debitor was not expreſly obliged to build the ſaid Houſe, and that *Titius* was only bound to pay 5000 Merks, when my Debitor ſhould build him ſuch a Houſe. I conceive that *eo caſu*, if may ſaid Debitor deſigned to defraud me by not fulfilling the Condition; our Law would allow me no Remedy.

To be intented by any true Creditor.

A Creditor is he to whom we owe any thing; againſt which we cannot defend our ſelves by a perpetual Exception. Δανειστης εστιν, ὁ εξ ἑαυτου αιτιας χωρις διηνεκοῦς παραγραφης χρεοσυμενος. *Baſil. de verb. ſignif. l.* 10.

1. By theſe Words it clearly appears, that this Action is competent to all Creditors, whether they were Creditors for an onerous Cauſe, or not. For though it would appear by the Narrative, that this Law was only deſigned to ſecure ſuch as were Creditors for an onerous Cauſe; and albeit it would ſeem that the only Reaſon why that this Law was introduced, was vvanting here; ſince the Creditor did not lend out of his Money in this caſe, in Contemplation of his Debitors Eſtate: Yet ſince in the conſtruction of Law, even Donations are good Rights, and the perſon to whom they are made, becomes thereby Creditor; *etiam donatarius eſt Creditor*, (except in the caſe where the Donation was revocable) therefore this Action is likewiſe competent to them; and ſo it has been oft decided in our Law: And particularly 15. *July* 1675. *Alexander contra Lundie*, where there being two Aſſignations made, and the laſt being firſt intimated, the firſt Aſſigney raiſed a Reduction of the laſt Aſſignation upon the Act of Parliament 1621. & it was found that tho' the poſterior Aſſignation firſt intimated, was the preferable Right ſo long as it ſtood, yet it was reduceable upon the Warrandice expreſs'd or implyed in the firſt Aſſignation, unleſs the poſterior Aſſignation had been for onerous Cauſes.

2. Though Creditors whoſe Term of payment is not come, differ from ſuch whoſe Debt is ſuſpended by ſome condition, the one being called *Creditor conditionalis*, and the other *Creditor in diem*; which two differ both by the Civil Law, and ours; yet whether either of them be comprehended under the general Word Creditor, where that word is uſed in Statutes, is much debated. *Cagn. ad l.* 1. *ff. Si certum petetur* is of opinion, that theſe are not true Creditors, becauſe a Debitor is he who may be forced to pay, *l. Debitor ff. de verb. ſign.* with which Law the *Baſilicks* do agree, for *l.* 66. *tit. Baſil. de Reg. jur.* ὁ δικαιαν εχων παραγραφην ουκ εστι χρεωστης, but ſo it is that he who owes to a day, or under a Condition, cannot be forced to pay. 2. The Law called a conditional Debt, the hope only of a Debt. §. *Ex conditionali juſt. de verb. obl.* 3. Theſe are called Creditors in this Title, *quibus ex quâcunque cauſa cum debitore eſt actio*, but ſo it is that before the condition be purified, or the Term of payment, there can be no Action, *l. cedere diem*, & *l. Creditores: ff. de verb. ſignif.* But yet on the other hand, theſe are both Creditors, becauſe the Law makes Creditor to be *genus*, the *ſpecies* whereof is *Creditor purus*, *Creditor in diem*, & *Creditor ſub conditione*, *l. Creditores ff. de verb. ſignif.* 2. It is clear *per l. in Leg. Aquil.* 40. *ff. ad l. Aquil.* That a conditional Creditor may purſue to have his Debt payed, or ſecured, when the Term comes, though it be not yet come. 3. *Ille vere eſt Creditor, qui perpetua exceptione non poteſt removeri, l. creditores, ff. de verb. ſig.* But ſo it is, that neither Creditor *in*

diem, nor Creditor *ſub conditione*, *poteſt perpetua exceptione removeri*. 4. In Reaſon it appears, that ſince when the condition is purified, the Condition is drawn back to the date of the Contract; that therefore the conditional Creditor hath this remedy competent to him, *glos in d.§. ſi quis in fraudem.*

This Action then, is competent to Creditors, to whom a Debt is conditionally owing; but is not to take effect until the Condition be purified. As for inſtance, if *Titius* ſell me his Lands with abſolute Warrandice, and thereafter diſpone any part of his Eſtate, to a conjunct, or confident Perſon, without an onerous Cauſe, I might reduce that Alienation as done in defraud of me, though the Lands ſold to me were not evicted, and ſo the Warrandice did not actually take place. Which caſe though it be not expreſly decided in our Law, yet I find a Reduction *ex capite inhibitionis* ſuſtained in thir very terms, but with this juſt caution, *viz.* That the Reduction ſhould take no place till diſtreſs ſhould follow, which is likewiſe decided by the Civil Law, *l. potior ff. qui potiores in pig. §. 1.* where alſo the former Caution is uſed, *& ubi conditio purificata eſt, ibi conditio retrotrahitur.*

3. This Action is even competent to theſe Creditors whoſe Term of payment is not come, though it may ſeem, that till then they are not true Creditors, The reaſon why both the Civil Law & curs allow Reductions in theſe caſes is commonly thought to be, leaſt the Creditor to whom the Alienation is made, become *inſolvent*, and ſo the Action of Reduction, if delayed till then, would then become uneleſs. But if the Lands or others diſponed, be ſtill in their hands, it does not import whether they be inſolvent or not, ſeing Reductions are *in rem*, and do affect the Right diſponed, whatever be the Condition of the Perſon who receiveth the Right; and if they be diſponed to a third perſon for an onerous cauſe, the Reduction cannot be effectual; and for obviating that prejudice, the Creditor may inhibite. The true reaſon then for ſuſtaining Reductions at the inſtance of Creditors *in diem*, or *ſub conditione*, is, that though perſonal Actions for payment, are not competent to ſuch Creditors before the day, or the Condition exiſt, yet they may obtain Declarator, that notwithſtanding of ſuch fraudulent Rights, their Bonds ſhall be effectual to them, and their Debitors Eſtates lyable to them, and to Execution at their inſtance, as if thoſe Rights were not granted, and upon the matter, Reductions are nothing elſe but Declarators to the effect foreſaid.

4. By the common Law, ſuch as were Creditors *ex delicto*, had this Remedy, which though ſome Lawyers have contradicted yet it is moſt clear in my opinion; *l. 12. ff. de verb ſig. ſed etſi ex delicto debeatur, mihi videtur poſſe creditores loco accipi*: For though he only is a Creditor, whoſe faith we have followed, *l. 1 ff. ſi certum petat*: And that the Party injured cannot be ſaid to have followed the Faith of the Injurer, yet that Law expreſſes only one Quality of a Creditor; and there are many Creditors whoſe Faith we have not followed. And yet I have ſeen this debated in our Law, *February* 1674. *Lindſay* contra *Gray* of *Hayſtoun*, in which Purſuit a Reduction was raiſed by *Lindſay* againſt *Hayſtoun*, of a Diſpoſition made to *Hayſtoun* by him who had murdered her Husband, after the Murder committed, to the prejudice of the Aſſythment due to her, and thereafter decerned to her by the Exchequer: From which Reduction the Lords aſſoilzied, becauſe *Hayſtoun* was not obliged in Law to know of the Murder, nor did any Regiſter put him in *mala fide*, and ſingular Succeſſors are only obliged to ſeek the Regiſters; and ſhe having only the Gift of the Murderers Eſcheat (he being denounced in abſence) for ſatisfaction of the Aſſythment due to her; the Lords found ſhe might purſue Declarators of Eſcheat, but could not purſue real Actions.

And

And generally with us in *Scotland*, he who commits a Crime, is either only denounced Fugitive, and in that caſe, his Eſcheat only falls, or he gets a Remiſſion, and then there is an Aſſythment due, but in neither of theſe caſes Reductions upon this Statute are ſuſtained, or elſe the Murderer dies, and then nothing is due even by way of Aſſythment with us. But this firſt ſeems unreaſonable, or at leaſt ſevere, for if a perſon ſhould commit a Crime againſt me, and ſhould thereafter to defraud me of that Aſſythment, and juſt Reparation that were due to me, diſpone his Eſtate to a conjunct or confident Perſon; It ſeems very unjuſt that I ſhould be diſappointed of my juſt Satisfaction by this voluntary Deed of his. And as this is not ſuitable to the Principles of Equity, and Juſtice; ſo neither ſeems it ſuitable to the Principles of Law, for *tantum facit quis delinquendo, quantum facit ſe obligando*, and therefore as I could have reduced any ſuch voluntar Alienation, if another had expreſly obliged himſelf to me, ſo ought I to have the ſame Benefit when another has committed a Crime againſt me: And if we conſider ſeriouſly the Principles of either the Civil, or our Municipal Law; we will find; that not only are Creditors *ex delicto* looked upon as Creditors, but that they have προτοπραξιαν, or *jus prælationis* to all other Creditors, in ſwa far as concerns the neceſſary Reparations. And thus it is with us expreſly declared by the 75. Act 14. *Par. K. Ja.* 2. and the 174 Act 13. *Par. Ja.* 6. that all Remiſſions, or Reſpits granted to any perſon till the Party Skaithed be firſt ſatisfied, ſhall be null. And by the 26. Act. 1. *Par. Ch.* 2. The Party from whom Goods are ſto'en, are to have Reparation out of the firſt, and readieſt of the Thiefs Goods. And the laſt part, *viz.* that nothing is due by way of Aſſythment where the guilty perſon ſuffers, ſeems unreaſonable for the Heirs of the perſon injured being put to great Expenſes in the Purſuit oft times, and the Wife, and Children, being oft times beggar'd by the death of the perſon killed, it is unjuſt that they ſhould have no Reparation; and the Offenders Death ſatisfies publick Juſtice, but not them. And I love better the Laws of *Spain* and *France*, which allows Reparation even where the Offender dyes.

For the better underſtanding of the general Point, how far the Fisk becomes a Creditor, by the common Law, upon the Commiſſion of a Crime, and ſo may reduce poſterior Diſpoſitions; It will be fit to diſtinguiſh theſe Caſes, firſt, before the Crime be committed, the Fisk has no Intereſt to reduce any Diſpoſition made by any perſon whatſoever, except the Committer had diſponed his Eſtate, upon deſign to diſappoint the Fisk when the Crime ſhould be committed; As for inſtance, if a perſon who deſigned to run in to the Enemy, or to kill the King, ſhould immediatly before diſpone his Eſtate; I conceive that Diſpoſition would be quarrellable, as done in *fraudem fiſci*. If this *animus committendi crimen, & fraudandi fiſcum*, could be made appear, by theſe, or ſuch like Preſumptions, *viz.* If the Diſponer did immediatly before the committing of the Crime, and without any onerous cauſe, grant the ſaid Diſpoſition, and made a Diſpoſition *omnium bonorum*; for a particular Diſpoſition of any ſmall part, though made immediatly before, and though *gratuitous*, could hardly be quarrelable *ex hoc capite*. 2. If the Receiver of the Diſpoſition was conſcious to the Diſponers deſign of committing the Crime, then if the Crime was Treaſon, the Receiver is guilty of the Crime; and ſo the Diſpoſition, and all the Receivers own Eſtate falls to the Fisk. And in theſe Crimes a Diſpoſition made to one who was conſcious to the Deſign, makes the Diſpoſition quarrelable whether it be made for an onerous Cauſe, or not, or whether it be *omnium bonorum*, or not. 3. As to Diſpoſitions made after the Crime is committed, we muſt diſtinguiſh thus, *viz.* either the Crime committed is Treaſon, and all Diſpoſitions made after the per-

petrating of this Crime are null, though before Citation, or Condemnation, but there muſt ſtill enſue a Sentence, which Sentence is drawn back to the committing of the Crime. 4. In other Crimes, Diſpoſitions are either of Heretage, or Moveables; As to Heretage, no Diſpoſition is quarrelable, becauſe no Crime confiſcats Heretage, except Treaſon. And yet *quoad* Aſſythments to the Party wronged, I think there is in reaſon (though our Law allows it not) ſo far *jus quæſitum*, to them, that they may quarrel all gratuitous Diſpoſitions, though made before Citation, as made to their prejudice; who became lawful Creditors by the Injury ſuffered in the ſame Crime: but if the Diſpoſition was for an onerous cauſe, I conceive it cannot be reduced *ex hoc capite*, or affected with the ſubſequent Aſſythment becauſe the Buyer was *in bona fide* to buy, finding nothing againſt him in the Regiſter of Hornings, or Inhibitions. And that though he knew the Diſponer had committed the Crime, becauſe he was not obliged thereby to know that he was incapacitated in Law to diſpone. 5. In other Crimes, beſides Treaſon, Diſpoſitions of Moveables are quarrelable by the Fisk, if made after Sentence, and it may be, if after the party was cited for the Crime, if the Crime was ſuch as did confiſcat Moveables. For though *regulariter poſt commiſſum crimen, valet alienatio ante ſententiam facta titulo oneroſo neque revocatur niſi appareat contrahentium fraus. Angel. Ad. l.* 1. *Siquis C. de bon. proſcript*, yet there lies ſtill a preſumption, that all Diſpoſitions made after an accuſation are made *metu juſtæ pœnæ. Picus ad l. poſt contract.* And all Lawyers are of opinion, that in neither of theſe caſes, a delinquent may pay his former Creditors: And it is a received opinion amongſt us that all Crimes which are capital do confiſcate the committers Moveables, though there be no Act appointing that confiſcation, as a part of the puniſhmeut, becauſe Moveables, *ſequuntur perſonam* And thus in the caſe of *Waugh* in *Selkirk*; The Lords found his Moveables to fall under Eſcheat for Theft, though there be no expreſs Statute confiſcating the Moveables for Theft. But though this be followed in ſome particular Nations, as *France Ultrad. Conſil.* 17. yet *Clarus* tells us, in *Queſt.* 78. that *de conſuetudine totus mundus ſervat quod bona mobilia non confiſcantur niſi ex diſpoſitone ſtatuti, vel conſuetudinis, excepto crimine Hæreſis, & leſæ Majeſtatis.* And particularly in Theft, *Boſſius* is clear, that the Moveables are not Eſcheat *niſi vigore ſtatuti.* And why with us ſhould it be declared by ſome Acts, that the Committers Life or Goods ſhall be in the Kings will, and in others, that the committers Moveables ſhall be Eſcheat to the King, if this hold in all caſes? 6. Where the committer is declared puniſhable by confiſcation of his goods, and his goods are confiſcated *ipſo jure*, there even after the committing of the Crime ſome think, that the committer can diſpone no part of his Moveables, even before denunciation or citation. That being the effect of confiſcation *ipſo jure*, as is clear by the above cited Doctors. And it would appear, that confiſcation *ipſo jure*, muſt import ſomewhat more than the confiſcation that reſults only conſequentialy from the nature of the deed it ſelf. For elſe why needed the Law expreſs this; and if the Law has confiſcated them at the time when the Crime was committed, it would appear that the *dominium* is thereby transferred to the Fisk, and that conſequently the committer is deveſted of them, *nam duo non poſſunt eſſe domini in ſolidum.* And if the committer be thereby diveſted of the property, he cannot diſpone for none can diſpone but he who is proprietor. And yet even in that caſe the perſon injured, ſhould have ſtill action for his damnage, and intereſt, for he is more prejudged by the Crime, than the Fisk; and conſequently it is not juſt that he ſhould be excluded by the Fisk, ſince the Fisk has only intereſt by him, and by the wrong which he has ſuffered. But I refer the reader to *Perigrinus, De jure fiſci*, who has treated this queſtion moſt learnedly.

5. This

5. This action is not only competent to the Creditor himself, but to the Creditors Heir, for *hæres & defunctus sunt in jure, una & eadem persona*, and not only is it competent to the Creditors Heirs, but in many cases, it is competent to his singular Successor, to whom either the Right is assigned, or who becomes singular Successor, *ratione rei*, as Donators to Escheats, and Forefaulters, *&c.* as was found. *March* 1636. 6. The *Defuncts* Creditors are allowed to reduce Alienations made to the prejudice of appearand Heirs, upon death-bed, when these Heirs were their Debitors, for though this priviledge seems only introduced in favours of appearand Heirs, yet their Creditors may comprise from them *omne jus quod in iis est*, and so reduce, as having comprised, as was found at the instance of *Balmerinochs* Creditors *contra* the Lady *Coupar*, and the 4th *January*, 1672. *Roxburgh contra Beatty*. And in this case it was found that even Creditors might pursue Declaratours and Reductions, upon this Act, though they had not yet Appriſed, albeit it was then alledged, that none has interest by our Law to pursue Reduction of a Real Right, except such as have a real Right standing in their person to the Lands, whereof they crave the Right to be reduced. It is in some cases, not only competent to such as were *Creditors* before the alienation quarrelled was made, but even to such as were *Creditores futuri*, and became Creditors only after the Alienation quarrelled was made. And the Civilians mention two cases wherein this Action is competent even to such as were not Creditors the time of the Disposition quarrelled: The first is, if the Disponer designed to borrow money before he made the fraudulent Alienation, and did borrow the money upon design to break with it, for there though the Reducer was not a true Creditor, the time of the Alienation, yet the fraudulent inclination respecting expresly this Creditor, or the borrowing of the money; made the *Disposition* revocable and reduceable. *Jason ad inst. hoc tit. num* 6. but here the design must be expresly proven, or at least must be necessarily inferred from convincing circumstances, and presumptions. The second case mentioned by them, is, if the Creditor did lend the money for paying prior Creditors; In which case, as they might have reduced the deed done in their prejudice, so may the posterior Creditors, since they come in place of the Creditors whom they payed; *& surrogatum sapit naturam surrogati*. But this last case does not (for ought I remember) take place in our Law, and seems not at all suitable to the Analogy of our Law in other cases; for else he who had lent money to pay sums due upon an Inhibition, would have right to the Inhibition, or he who lent money to pay off Compryings, or Arestments, without being expresly assigned to either. And therefore I conceive, that either the Creditor who payes the Creditors who were prior to the Alienation, takes assignations to these prior Debts which these pays, and then they may reduce deeds done to the prejudice of the first *Debt*, or else he pays only the money to the *Debitor*, and the *Debitor* pays the prior Creditors which is the case meaned by the *Doctors* here, and in this case I conceive, the Creditor who so pays, would not have the priviledge, and that because the *Debt* which only had the priviledge is extinguisht, *& non entis nullæ sunt qualitates*, nor can the Maxim, *surrogatum sapit naturam surrogati*, take place here, seing that the *Debt* in whose place it is surrogat, became extinct before the surrogation: and none of the parties could design to transmit this priviledge, else the payer had taken Assignation; nor can he complain since *sibi imputet*, who did not that which he might have done for securing himself. As to the first of these cases, there was a famous decision extending thir Reductions even to posterior Creditors, 2. *July*, 1673. at the instance of *Street*, and *Jackson*, English-men; against *James Mason*. The case whereof was this

James Maſon having diſpon'd his Lands to *James Maſon* his Son, the ſaid *Street* and *Jackſon* raiſed a Reduction of the ſons right, as granted in prejudice of them, who were lawfull Creditors to him, by vertue of a Trade and correſpondence which was begun long before the Alienation; though the Bonds wherein he became Debitor to them were of a date poſterior to the Alienation. To which it was anſwered, that the ground of the Debt, being a Bond, and the Bond being poſterior to the Alienation, they were not Creditors at the time of the Alienation; and conſequently the Alienation was not reduceable upon this Act of Parliament 1621. To which it was replied, that this purſuit was not founded upon this Act 1621. only, but upon the ſure principles of the common Law, according to which the Lords uſed to decide before this Statute was made, and according to which, they are warranted to proceed by this Statute in caſes that are new. Though the Debt was not conſtitute till after the Infeftment was granted, yet the purſuers having long before that time entred in a Trade with *Maſon*, they did *bona fide* continue that Trade without any interruption, and under the colour of that Trade he had moſt fraudulently bought with their moneys this Land, and did moſt fraudulently convey the ſame to his Son to their prejudice. Which did clearly infer a deſigned fraud in the Father. and tended inevitably to ruine all Trade and Commerce which might be very eaſily diſappointed by ſuch fraudulent conveyances as this. Upon which debate the Lords ordained *James Maſon*, the Fathers count book to be produced, that it might appear in what condition he was at the time when he made that Diſpoſition to his Son; And vvhether the ſame vvas granted upon deſign to fruſtrate his Creditors, or not, likeas they allovved Witneſſes to be adduced for either party, for clearing the Lords how far the Trade was continued betwixt the Father and thoſe purſuers, before, and after the Sons right; After making of which report, the cauſe being again called, it was urged for the purſuer, that by the report it was clear that there was a former Trade, and correſpondence betwixt them, prior to the Sons Infeftment, during all which time he oftimes ſold cheaper than he bought; and that when he went to take the Infeftment for his Son, he diſguiſed himſelf, and rode from, and to the Land, in a by-way, and cauſed ſo mark the Seaſing in the Minut-book, that no man could know but that the Seaſing vvas taken for the Father, and after the Seaſin was taken the Father ſtill remained in actual poſſeſſion. From all vvhich it vvas argued, 1. That *Maſon* elder having entered into a publick and uninterrupted Trade, and correſpondence vvith the purſuers, the ſaid Trade is to be conſidered with reſpect to its firſt beginning, and the Bonds though poſterior to the Infeſtment, yet are to be drawn back *ad ſuam cauſam*, viz. the Trade and Commerce from which they did reſult. 2. It was clear from the Nature of Commerce in general, and from this report in particular, that former payments were ſtill made the foundation of new credit: And if the making of ſuch Rights during the dependance of ſuch a continued Trade were allovved in favours of Children; no Merchand vvould give truſt, or if they gave, they might be ruined by it, both vvhich vvould be equally deſtructive to Trade, 3. If vve conſider the Analogy of our Lavv, vve vvill find, that the Lords have ſtill conſidered a continued, and uninterrupted Trade as very priviledged in many caſes; And therefore though other compts preſcribe in three years, yet that Statute uſes not to be extended to a continued Trade and correſpondence, and ſo far have *privilegia mercatorum, & commercii*, been allovved in our Law, that Bills of exchange are allowed though vvanting the ordinary, and Statutory ſolemnities of Witneſſes and Warrands; for payment of Bills of Exchange are ſuſtained vvithout the ſolemnity of intimation, againſt poſterior Aſſignayes, and Arreſters: and Annualrent is ſuſtained betvvixt Merchants, *ſine pacto, vel*

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lege, and a Bills ſubſcribed only by a mark, vvithout either the ſubſcribers intire name, or the initial letters of it, was ſuſtained, it being proven that the drawer of the Bill was in uſe ſo to ſubſcribe. 4. By the common Law, *Actio Pauliana* was extended even to poſterior Creditors, where *animus fraudandi*, prior to the Alienation did appear, either by Writ or Preſumption, which are enumerated by *Jaſon*, *ad Inſt. hic*; and are very far ſhort of the Preſumptions formerly condeſcended on: and if the common Law, and natural reaſon allowed this remedy in the caſe of Debts abſolutely poſterior; how much more ought it to be allowed in this caſe, where the Debt, which is the ground of this purſuit, depended on a prior cauſe and was the reſult & product of a correſpondence entered into, before granting of the Sons Infeftment. 5. The Father had no Eſtate before this correſpondence, and having drawn fraudulently into his hands the purſuers goods, about the ſame time that he bought the Land, Law & reaſon preſumes that the price of their goods, did pay the price of thir Lands: And that therefore this Land ought to be affected and burdened with their debts. To which it was duplyed 1. That though the common Law did allow *Actio Pauliana* to poſterior Creditors, yet that was only in the caſe where the receivers of ſuch Rights were *participes fraudis* which cannot be alledged here, ſince the Son was minor, *nec doli capax*, and that eſpecially being introduced *in odium* of the colluſion it cannot be extended to caſes where no Colluſion, can be alledged upon the receivers part. 2. Commerce and Trade is founded upon perſonal truſt, and Merchants follovv the faith of thoſe vvith vvhom they trade, without ever conſidering what real Eſtate they have; ſo that thir purſuers cannot be ſaid to have been cheated in their expectation, ſince they cannot be ſaid to have furniſhed their goods, in contemplation of the real Eſtate now contraverted. 3. Either thir purſuers did ſearch the Regiſters or not; if they did, not *ſibi imputent. qui ſibi non vigilarunt*; and if they did, they would have found that the Son was Infeft, his Infeftment being Regiſtrate, and though the minute book did not ſpecify, whether the Seaſing was granted to *Maſon* elder, or younger, yet they ought to have ſearched the Regiſter it ſelf, whereof this is appointed to be but an Index, and the Son not having been *particeps fraudis* could not, have been prejudged by any cheat or contrivance of his father: for the *jus quæſitum* to him by the Infeftment, *ſine facto ſuo, ab eo auferri nequit*. 4. The purſuers did innovat their accompts by taking Bond for the product, and *Maſon* had a Diſcharge of all former accounts and trade: ſo that at the time of the Diſpoſition, he was not their Debitor upon the accompt of any prior Trade; and the purſuers were no more to be conſidered as Merchants, but as common Creditors: And it vvere a very dangerous conſequence, to make Debts that are innovated, retain all the priviledges that they had *ante innovationem, & per novationem prior obligatio perimitur. l. 1. ff. de Novationibus*. 5. It can be made appear, that *Maſon* had other Trade, vvhich vvould have furniſhed him the price of the Land, and that he vvas loſſer by the purſuers, Trade. To vvhich it vvas triplyed, that the common Lavv did only conſider *participes fraudis*, in order to another effect, *viz.* if the Alienation vvas *ex cauſa oneroſa*, then the Alienation could not have been reduced; unleſs the receiver had been *particeps fraudis*; but vvhere it is *ex cauſa mera lucrativa*, as in this caſe, *fraus in eventu* vvas ſufficient. And even here the Diſpoſition being made by the Father to his ovvn Son vvho vvas *in familia*, the Son vvas in as ill condition, as if he had been *particeps fraudis*: nor could he plead the ſame benefit as a ſtranger, contracting *bona fide*. Upon vvhich debate, the Lords did reduce the Diſpoſition, as being made to the Son, by the Father, who was a Merchand, during his dublick Trade and correſpondence. Which Diſpoſition could have no other rational deſigne, but to cheat Creditors, the Father not having ſo much as reſerved himſelf a liferent, or power to redeem. But ſince the Lords declared that this Deciſion proceed-

ted upon all theſe grounds joyntly, it can hardly be extended to other caſes. And I find that this publick intereſt, and advantage of Trade and Commerce, has been ſuſtained to reduce deeds done to the prejudice thereof: but yet not upon this Act, and Statute, but upon the general ground of fraud, inferred by moſt pregnant qualificatious, as is clear by the Deciſion betwixt *Pot* and *Pollock*. 12. *Feb.* 1669. The caſe whereof was this, *John Pollock* being Debitor to his Wife of a ſecond Marriage, for her life-rent proviſion, and to others to whom he owed money, they appriſed his Eſtate, and aſſigned their Rights to *Pot*, who thereupon intents Reduction of a Bond granted by the Defunct to *James Pollock* his Son of the firſt Marriage, for 5000. merks. The reaſons of Reduction were, firſt, that this Bond was granted by a Father to his own Son, without an onerous Cauſe. To which it was anſwered, that they not being Creditors when this Bond was granted, this Act of Parliament allowed them no Reduction of it, for this Act is only conceived in favours of prior Creditors, and ſince his Father might have gifted away his Eſtate to a ſtranger, and even that gift could not be quarreled by poſterior Creditors, becauſe they had not then intereſt, and ſo their intereſt could not be ſaid to be prejudged, there was no ſpeciality as to him, why he might not be capable of the ſame Donation; And whereas it was alledged, that this would ruine Commerce, becauſe a Father might grant ſuch a right, and thereafter keep it latent, and cheat his Creditors with whom he Traded, who could not know the condition of the Defunct. To this it was anſwered, that the Act 1621. introduced no ſuch ſpeciality in favours of Trade, but upon the contrair, ſuch Diſpoſitions when made by Merchants, were leſſe preſumeable to be done in defraud of Creditors, than when made by ſuch as had no Trade, nor Commerce, becauſe Traders might grant Bonds to their Children in expectation of what they might gain, and when they fell thereafter *inſolvent*, that might be imputed to their loſſe by Sea, or Trade, and not to the Donation in favours of children. Upon which debate, the Lords repelled the reaſon founded upon the Act 1621. The 2. reawas, that this Bond was reduceable *ex capiti doli*, as granted by colluſion betwixt Father, and Son, in *necem Creditorum*, and to defraud their juſt intereſt: which *dole*, and fraud, was infered from theſe circumſtances, 1. That the Son being *foris familiat*, and provided, it could not be granted for any onerous Cauſe. 2. The Bond was kept latent till the Father dyed. 3. It did bear no Annualrent, and the Term of payment was delayed till after the Fathers death. 4. Their Debts were all contracted immediatly after the granting of this Bond; ſo that it appeared clearly, that he had deſigned to exhauſt his Eſtate by this Bond in favours of his Son, and then to contract Debt freely, and to apply their money to the payment of this Bond. Upon which qualifications of fraud, the Lords reduced the Bond. The third reaſon was, that this Bond granted by a Father to a Son, was but a *legitim* or *portion natural*, in the conſtruction of Law, and therefore was revocable by the Father, and coneſquently by his Creditors; and *legitims* did only affect the Defuncts free Gear; which reaſon was alſo juſtly repelled, for this being a Bond granted to a ſon, who was *foris familiat*, and being delivered to himſelf, was found not to be of the nature of a *Legitim*. Firſt, becauſe it did not bear to be in ſatisfaction of his *portion natural*. And ſecondly, becauſe it was an ordinary Bond, and delivered in the ordinary vvay.

I find likevvays a ſecond caſe, decided in favours of poſterior Creditors 28. *Novemb.* 1679. *Cathcart* contra *Glaſs*, wherein *Cathcart* having raiſed a Reduction of a Diſpoſition made by *Glaſs* to his Brother in Law, it was alledged that the Diſpoſition was prior to any Decreet obtained at the inſtance of *Cathcart*, by which Decreet only he became Creditor: To which it was replyed

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that though the Decreet was posterior to the Disposition, yet the Debt and Process thereupon was prior. 2. The Brother in Law was *particeps fraudis* in so far as one of the Brothers-in-Law being but a Shoemaker had lately taken up a trade of bringing over seeds from Holland and having sold rotten seeds to this pursuer; for which the process was raised, he to defraud these whom he should cheat by this Commerce made this *D*isposition to his Brother in Law. The Lords, upon this Debate, found the reason of Reduction, thus qualified, relevant *viz.* that either the Bargain for the seeds was prior to the Disposition, or that the Disposition it self, tho posterior, was granted to a *B*rother-in-Law *animo fraudandi* & to the behove of the Granter, but this they found only probable *Scripto vel juramento partis*, or by such pregnant Presumptions and Evidences, as might necessarly infer that there was a fraud,

There was a third case decided *4th. Decemb.* 1673. Wherein the Lords reduced a Disposition granted by *Reid* of *Daldilling* to his son, even at the Instance of posterior Creditors, in respect that the Right was base, and that the Father continued still in possession, and acted still as absolute Fiar, and that the Registers of that Shire were carried out of the countrey, so that they neither could, nor were obliedged to know the Sons Infeftment. And that, albeit it was alledged for the Son, that as fraud never ought to be presumed, so there is no ground for presuming it here, since this Infeftment ought to be imputed to another cause, than a design to defraud Creditors, *viz.* to a prior Contract of Marriage; wherein his Father having gotten a great portion with his Mother, was therefore obliged to Infeft him in his Lands, and this being the ordinary way taken to secure antient Families against prodigal Sons: And it being the ordinary remedy taken by provident men, when they give great portions with their Daughters; It were very dangerous to reduce such Dispositions at the instance of posterior Creditors; in whose favours nothing was provided, by the Act of Parliament, and the Sons Infeftment being registrat did likewise take off all presumption of Fraud. And though the Registers were taken away, that could not prejudge the Defender, or be a ground of Reduction here, no more, than it could defend him against a Reduction *ex capite inhibitionis*, or *interdictions* for the user doing *omne quod in se est*, & following the faith of publick Registers, cannot be prejudged by an accident, to which he had no accession. And there was as good reason for reducing interdictions at the instance of posterior Creditors, as for reducing such base Infeftments: the not allowing of which would still force Sons thereafter to be at the great expence and trouble of publick Infeftments, and even these publick Infeftments, were lyable to the same reason of Reduction, since lawful Creditors were in both cases prejudged; and a Son preferred to them. And though equity should be considered, where there is no Law; yet where there is an expresse statute, in which many cases are considered, *casus omissus, habetur pro Omisso.* It was here observable, that the Contract of Marriage did not bind the Father to Infeft the Son in these Lands, but that hereby the Estate was only provided to the Heirs of Marriage, so that the Son behoved to have been served Heir, and so would have been lyable to the Fathers Debt, if this new Infeftment which was here quarrelled, had not interveened.

Not only deeds done to the prejudice of prior Creditors are reduceable, but even deeds done *dolose* to the prejudice of such as became Creditors, at the same time with the deed done, are reduceable. As for instance, one brother grants a Bond to another, upon designe to let the friends of her whom he is suiting in Marriage, see that he has an Estate, and immediatly after the Contract or about that same time, grants a Discharge to his Brother, having engaged the Womans Friends to give him a great Tocher in contemplation

of that fallacious Bond: this Diſcharge is reduceable, as given fraudulently to the prejudice of the Woman who gave the Tocher. And who is Creditrix by that Contract, without reſpect to priority or poſteriority of the Debt. As was found in the the caſe *Henderſon* againſt *Henderſon*; and *Donald Foller* being provided by his Father, in his Contract of Maraiage; to the Conjunct-fee with his Wife, of a Tenement of Land, the Fee whereof was provided to the Children of the Marriage, and the Father having fraudulently taken a Tack from the Son at the ſame time; the Lords reduced the ſaid Tack, as done on defraud of the ſaid Contract, *& contra fidem tabularum nuptialium.* As it this had been otherwiſe decided, all poor women might eaſily be cheated, and contracts of Marriage, which are the Obligations moſt priviledged by Law, would become ineffectual and might eaſily be evacuated: And ſo favourable are ſuch Obligations in Contracts of Marriage: that *Clencorſe* having provided his Sons by ſeveral Bonds of Proviſion, and having thereafter diſpon'd his Eſtate to his Son in his Contract of Marriage, the Son having got a good Tocher in contemplation of this Eſtate; the Lords did find, that the Sons Fee could not be reduceable by, nor affected with thoſe Proviſions, ſince they were but latent Rights, which neither the Son, nor they who contracted with him were obliged to know.

The preſumptions from which Lawyers conclude a deſigne of cheating future Creditors, are thoſe. 1. if the Debitor diſpone all his Eſtate, *aſſignatio omnium bonorum*, eſpecially if he reſerve not his own Liferent, as in *Maſons* caſe, for it is preſumed, that no man would denude himſelf of all means of ſubſiſtence without ſome malicious deſigne, and if the Diſpoſition be made without an onerous Cauſe, *l. omnes §. Lucius ff. de his quæ in fraud:* or for a leſſe price, than the thing diſpon'd was truly worth, *Strach quart. de decoct. part* 3. *num.* 27. but ſince *licet contrahentibus in emptione vel venditione ſe in vicem decipere*, it ſeems that this extenſion ſhould not hold, , except where the thing diſponed is much under-rated. 2. If the Diſponer be Bankrupt, or a Cheat, or *deplorata vitæ. Strach num.* 23. 3. If he borrowed immediatly after the Diſpoſition. 4. If he borrowed ſecretly, and deſired to conceal his condition, as in *Maſons* caſe. And 14. *Decemb.* 1661. *Duff.* contra *Culloddin* this qualification of fraud, was ſuſtained to reduce a Right made by one Brother to another, *viz.* That the Brother in whoſe favours the Right was granted, deſired the Reſignation and Infeftment thereupon ſhould be kept ſecret, and thereafter ſuffered his Brother to continue in poſſeſſion. 5. If he borrowed ſums far above his fortune: and upon this laſt preſumption, a Merchant in *Paris* was executed, having borrowed vaſt ſums, with which he broke next morning after they were borrowed.

To any Conjunct or Confident Perſon.

THe reaſon why the Act ſuſpects ſuch, and is more unfavourable in the caſe of Diſpoſitions, and Rights made to Conjunct or Confident Perſons; is, becauſe theſe have eaſier occaſions of making, and are more prone to make ſuch Rights than any elſe. For what ſtrangers would cheat Creditors for one another? and though a Debitor will be deſirous to prefer his Creditors to ſtrangers; yet he will be ready to prefer his Friends to his Creditors. Which reaſon ſeeme to be inſinuat by that excellent Law, *l*, 27, *C. de donat. Data jam pridem lege conſtituimus, ut donationes interveniente actorum teſtificatione conficiantur, quod vel maxime inter neceſſarias, conjunctaſq;*

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perſonas convenit cuſtodiri; ſi quidem clandeſtinis ac domeſticis fraudibus, facile quidvis pro negotii opportunitate confingi poteſt, vel id quod vere geſtum eſt aboleri. And the Doctors have received as a brocard, that *conjunctus præſumitur, ſcire facta conjuncti l. octavi. 1. ff. unde cognati*: & therefore *præſumitur alienatio in fraudem facta, quando facta eſt donatio omnium bonorum vel conjunctæ perſonæ*, Bart. *ad l. poſt contractum ff. de donat. num.* 23. Our Laws has not fully determined who are repute conjunct perſons, ſince this opens a door to arbitraryneſs in Judges; it had been fit the Law had obviated by a ſpecial definition, *quoad* this poynt the Power of Judges, as well as the fraudulent conveyances of Creditors. But certainly Father & Son, & all degrees aſcendent and deſcendent, are repute conjunct, And becauſe theſe are the moſt near Relations, therefore Diſpoſitions made to them, are not only reduceable by this Statute; but ſuch Diſpoſitions, when made to ſuch as might have been Heirs, make the receiver, ſucceſſor *titulo lucrativo poſt contractum Debitum*, Which paſſive title was not extended againſt a Brother, though the Diſponer was ſo old that he could not expect Succeſſion whereby his Brother might be excluded, nor was the preſumption of fraud ſo ſtrong amongſt collateralls. as to infer ſo odious a paſſive Title, but reſerved Action upon this Act, 1621. in ſwa far as the cauſe was not onerous, 17. *December.* 1672. *Spencer-field contra Kilbrakmont.* 2. Brother and Brother are repute conjunct Perſons And Uncle and Nevoy as was found 13. *January* 1678. *Kinloch* of *Gourdie* contra *Blair*. And Aunt and Neice 15. *July* 1675. *Alexander contra Lundie*; but whether this ſhould be extended to Couſin Germans is more debateable, for there is no deciſion betwixt ſo remote Relations, and it were hard to oblidge ſuch Relations, to prove an onerous Cauſe otherwiſe than by the narrative. And the Annulling of a Right unleſs the onerous Cauſe be proven, being a part of this Law, which is both Penal and Correctorie, it were hard to extend it; but yet on the other hand Couſin Germans are reputed ſo far Conjunct Perſons in other caſes that they cannot be Witneſſes for one another. 2. The Act of Parliament ſpeaks of defrauding Creditors in favours of Children, Kinſmen and Allays, nor can it be denyed but Couſin Germans are eſteemed conjuncts by the common Law. 3. The danger of annulling ſuch Deeds and Rights being eaſily obviated by keeping up the Documents whereby the onerous Cauſe can be proven it is much more juſt and convenient that ſo near Relations ſhould be put to this trouble, than that ſtrangers ſhould be expoſed to be defrauded by contrivances amongſt thoſe who are ſo nearly related. But whether this ſhould be extended to the ſame degrees in *affinity*, as in *conſanguinity*, has often been contraverted; and it is certain, that in other Statutes, *non idem eſt jus affinitatis, ac conſanguinitatis*, And thus the Statute forbidding Father, Son, or Brother, to Judge in Actions of their *correlati*, is not extended ſo as to prohibit Fathers, Brothers or Sons in Law, to Judge in ſuch caſes; as was found in *Mores* caſe againſt *Grubbit*. But yet a Siſter in Law was found to be a Conjunct Perſon, 5. *July* 1673. *Hoom* contra *Smith*. And a Brother in Law was repute a conjunct Perſon in the Reduction againſt *Major Biggar* at *Waughaps* inſtance. And *Sneidivin hoc tit. pag.* 1209. tells us, *that inter affines & conjunctas perſonas fraudes præſumuntur*. And ſince men will do as much for their Allies, as for their blood Friends, eſpecially for Siſters, or Brothers in Law; and that the Law upon that ſame reaſon repells them from being witneſſes: It ſeems moſt reaſonable that they ſhould be repute conjunct Perſons. And it is not imaginable why the Law, which is jealous that an Allye or *Affinis* may perjure themſelves for another, ſhould not be much rather unwilling to aſſiſt them in ſuch conveyances as theſe to the prejudice of their Creditors, where the Cheat is eaſier, and leſs dangerous.

But whether a Baſtard be ſuch a conjunct Perſon, as that a Diſpoſition

made to him by his Father is Reduceable; may be doubted: for upon the one part, a Baſtard *patrem demonſtrare nequit*, and he who is of no blood, cannot be conjunct upon the account of Blood: And yet upon the other part, a Baſtard is known to have much natural affection, and ſo may be preſumed a perſon willing to convey ſuch frauds: and upon this accompt, the Law rejects him from being Witneſs in Favours of his natural Father, *Marſil. ſingul.* 273 And a Baſtard with us is only received *cum nota*. And the Law hath allowed him action againſt his Father for Aliment. And though the Law will allow him no advantage by his birth; yet it ſhould not capacitate him to cheat others: And I think this diſtinction more reaſonable than to ſay with *Paleot*: that Baſtards are not conjunct upon the Father ſide, but on the Mother ſide. *cap.* 60. *de nothis*, or to ſay with *Alex. conſil.* 60. that theſe are to be accounted Conjunct, in ſo far as concerns marriage only, ſo that a Baſtard Brother cannot marry his Baſtard Siſter; for certainly, though theſe be not conjunct in ſtrict Law, *ſunt conjunctis ſimiles. Felin. ad cap. per tuas de probat.*

Who is underſtood to be a confident, ſeems more difficult, and it would ſeem that an ordinary Factor, or a Domeſtick Servant muſt be ſaid to be confident Perſons, and an ordinary Agent was found to be ſuch a confident Perſou, 26. *June* 1672. *Monbra* againſt *Spence*, and *Immola ad h. t. leg. poſt contractum* affirms that *amicus, magna amicitia conjunctus*, is lyable to this preſumption, and the Law judges ſtill of him as of *conjunctus ſanguine*, and friendſhip is oftimes warmer then blood.

Diſpoſitions likewiſe *omnium bonorum*, are reduceable; though not made to confident Perſons, but to a meer ſtranger: except the Diſpoſition be made for an onerous Cauſe, for the Law preſumes as I obſerved formerly, that it is made to prejudge Creditors; and it were unreaſonable that a meer gift ſhould be preferred to poor Creditors, this was found the 18. *November* 1669. *Henderſon* contra *Anderſon*. Albeit it was there alledged, that this Act declares ſuch deeds only reduceable, as are made in favours of conjunct and confident Perſons, for though this Statute make that a Preſumption of Fraud yet it excludes not other preſumptions, ſuch as were in this caſe, *viz.* that it was *aſſignatio omnium bonorum*, and that it bears to be granted for a cauſe falſly narrated, *viz.* for the ſum of two thouſand merks, wherein *Anderſon* was Cautioner for *Howat* the common Debitor; whereas it was offered to be proven by Diſcharges granted by the Creditor to *Howat* himſelf, that the far greateſt part of this ſum was payed before the Diſpoſition.

Since this clauſe of the Statute annuls deeds only done to confident or conjunct perſons, it would ſeem, that ſuch Rights when made to others who are not conjunct, nor confident, are not reduceable, and yet *de Praxi*, all Rights made to any Perſons whatſoever, without an onerous or neceſſary Cauſe, are reduceable by this Statute, and our Law conſiders the difference betwixt conjunct, or confident Perſons, and others; only in reference to the way of Probation, ſo that theſe muſt prove an onerous cauſe whereas others need not; This ſhews how myſteriouſly our Statutes are conceived.

Without true juſt and neceſſary Cauſes, &c,

Titulus oneroſus, is when any thing is diſpon'd with the burden of doing or paying ſomewhat; *titulus lucrativus*, is when the deed is meerly *gratuitous*, and proceeds from meer favour.

The Civil Law obſerved two Rules, in the difference betwixt an onerous and

and lucrative cauſe, *quoad* this Action. The firſt was, that this Action was competent, even againſt theſe who had received ſuch Rights for onerous Cauſes, when both the giver and receiver were guilty of Fraud, if they were partakers of the Fraud, *l. ait. prætor ff. h. t.* And in that caſe the thing alienated was recalled without reſtoring the price. The ſecond Rule was, that he who had received ſuch a Right, *ex cauſa lucrativa*, was lyable to reſtore, though he was not acceſſory to the fraudulent conveyance. *l. quod autem § ij. ff. eod.*

Our Law likewiſe conſiders two caſes, one is, if the Creditor had done no diligence; and then Rights made to their prejudice are only reduceable, if they be made to confident perſons without an onerous Cauſe: The other if the Reducer has as a Creditor done diligence, and then the Right s done to his prejudice are reduceable, whether they be made *ex titulo oneroſo*, or *lucrativo*. For by the laſt part of the Act, it is declared that the Debitor cannot prefer one Creditor to another, to the prejudice of any ſuch diligences.

How far children are Creditors to their Father, and may upon this Statute reduce deeds done by their Father in favours of other Children after their Proviſions, may be dubious in many caſes, of which I ſhall only name a very few. The firſt is, a Father by his Contract of Marriage with the firſt Wife, provides the Children of the firſt Marriage to ten thouſand Pounds and by the Contract with the ſecond Wife provides them to twenty thouſand Merks, and by a Contract with a third Wife provides the Children of that Marriage to ten thouſand Merks. The queſtion riſes, whether the Children of the firſt Marriage can reduce the Contract of the ſecond Marriage, *quoad* the Proviſions therein made: as made in prejudice of them who became lawful Creditors by the firſt Contract; or if the Children of the ſecond Marriage, may not do the ſame to the Children of the third Marriage: and I conceive that if the Proviſions be made to the Heirs of the Marriage, and if they enter Heirs, they cannot reduce, becauſe *tenentur præſtare*. But if the Contract bear Children of the Marriage, ſome think that they may aſſign their Portions, and the aſſignay may reduce theſe Proviſions made in the ſecond Marriage. And juſt ſo the Children of the ſecoud Marriage, may reduce the Proviſions made to the Children of the third Marriage: But I think, that either the Children of the firſt Marriage are Inſeft, and then certainly, the Father cannot prejudge them by poſterior perſonal Proviſions, or elſe where neither are Inſeft, I conceive, that if there be an onerous Cauſe, ſuch as a Tocher payed by the Contracts of the ſecond, or third Marriages, and then alſo the Contracts cannot be reduced upon this Statute: For theſe Contracts are not made to defraud Creditors, ſince they are made for an onerous Cauſe. Yea though there be no Tocher, yet even the Marriage is an onerous Cauſe; for who would marry if there were no Proviſion, and the deſigne here, was not to prejudge true Creditors.

The other Caſe is, a man in his firſt Contract provides his Land, and ten thouſand Merks to the Heir of the firſt Marriage, and in the contract with his ſecond Wife, he provides the Children of that Marriage, to the conqueſt that ſhall be made during that Marriage, The queſtion is, whether the Son of the firſt Mariage will be Creditor to the Father for ten thouſand Merks, even though he be ſerved Heir to his Father: For though here it ſeems, that *confuſione tollitur obligatio*, the Son of the firſt Marriage being both Debitor and Creditor Yet conqueſt is ſtill underſtood to be, *illud quod ſupereſt deducto are alieno*: and therefore the Children of the ſecond Marriage, can have no Right but with the burden of theſe ten Thouſand Merks. And in the caſe of *Scot* of *Bavila* contra *Binning*; The Lords found that the Heir might reduce the Proviſions made to the Wife, and Bairns, of the ſecond Marriage, in ſo far as

concerned, the ten thouſand Merks provided to the Heir of the firſt Marriage: but this may be doubted; for firſt it may be alledged that there was no Debt, ſince the Purſuer was the Debitor himſelf. But ſecondly if the money with which the Land was bought, was conqueſt alſo in the ſecond Wifes time, it ſeems againſt Law and Reaſon, that this ſhould not be called conqueſt *quoad* an Heir of another Marriage, *cui nihil deeſt*, though if the money had been conqueſt in the firſt Marriage, it might be more properly called *Æs alienum*.

A third caſe is this, a Father obliged himſelf in his Contract of Marriage with his firſt Wife, to provide the Bairns of the Marriage, to eight thouſand Pounds: but before his death he provides one of the three Bairns to the whole eight. The queſtion proponed was, whether the other two Daughters might raiſe a Reduction of the Diſpoſition made to their Siſter upon this Act. And for theſe Siſters it might be urged, that the Father became Debitor to them *pro rata*, even as if he had granted Bond to ſix men for a ſum, each of them would have had Right to a proportional part of it; at leaſt, that each Child became Creditor to him, and ſo ſomething was due to each of them. And conſequently he defrauded them by his diſponing all to any one: but for the other ſiſter, to whom the Diſpoſition was made, it might be alledged that the Father was Debitor only to the Bairns of that Marriage, *tanquam ſtirpi*. and ſo he ſatiſfied his Obligation by diſponing his Lands worth that ſum to any one of them, but was not Debitor unto them in *capita*. 2. The deſigne of the parties Contracters, in ſuch caſes, is only to ſecure the ſum to the Iſſue of that Marriage, without conſideration of any Diviſion; for this Proviſion is made to ſecure againſt Children of other Marriages; but not to ſecure one Child againſt another, and there may be ſome reaſon to be jealous of the Father in the one caſe, but not in the other. 3. This reſtriction were contrair to the Fathers *patria poteſtas*, and the Law is never jealous of the Fathers affection, but preſumes that his diviſion will be juſt, and what Judge ſhould be juſter to Children than a Father. 4. It were againſt the intereſt of the Commonwealth to reſtrain, or take away the Fathers power, of Diſtribution in ſuch caſes, which is the great curb, that the Father has upon his Children, for making them good Children, or good Citizens, and were it not againſt reaſon, that if the two ſiſters had been very Vitious, and the third moſt Virtous, that the Father ſhould have been ſo bound up, that he could not gratifie the one, or that he behoved to provide the other with Money to ſerve their luſts. 5. It is ordinar to provide expreſly, that the Money ſo provided to the Children ſhould be divided as the Father pleaſed, and the Law uſes to decide general caſes according to what is ordinarly pactioned; preſuming that to be the *tacit* will of the parties, which is ordinarily the expreſs will of other parties. Likeas if it had been contraverted amongſt the parties at the time when the Contract was to be ſubſcribed, who ſhould have had the Power of diviſion? certainly, it had been allowed to the Father. To which laſt I incline, except it could be alledged that all were equally deſerving, and that the Father, or Children preferr'd, had uſed indirect means in preferring one to the reſt. For though there be no *querela teſtamenti inofficioſi* with us, yet there may be ſome place perhaps, for the Judge to interpoſe iu ſuch caſes. I find by the opinion of the Doctors, a Father diſponing to one Child a neceſſary Portion, is not ſaid to defraud the reſt of the Children, to whom he diſponed formerly, *nam hoc potius tribuendum pietati quàm fraudi*. And it is clear, that for this reaſon *Libertus in fraudem patroni, filiæ dotem conſtituere poterat*, *l.* 1. *§. ſed ſi* 10. *ff. ſi quid in fraud. patro.* but is not ſo with us in all caſe, itsas has been formerly obſerved.

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It has been likewiſe debated, whether proviſions by Parents to their Children, in their Contract of Marriage, be ſuch onerous Cauſes as may defend the Children againſt Reductious upon this Act, at the inſtance of Creditors, who crave Diſpoſitions made to them in ſatisfaction of theſe obligations to be reduced. For upon the one part, it ſeems, that ſince they are Creditors who may purſue, and diſtreſs their Father, therefore their Father may diſpone his Eſtate, and this is both a neceſſary and a prior Debt, and ſo falls not under the Act; which declares only ſuch Rights reduceable, as are granted without true, juſt, and neceſſary Cauſes. And Proviſions of Children by Contracts of Marriage are the ordinary allowable remedies granted to ſuch as paying Tochers with their Daughters, or providing their Sons, deſire to ſee their Grand Children thus ſecured. But upon the other hand, it ſeems very hard that ſuch latent deeds as Contracts of Marriage, which Creditors cannot know ſhould be ſuſtained as onerous Cauſes to ſeclude them; and that the Debitors own Children ſhould be preferred to Creditors. And as there can be no debate as to this point, where the Proviſions are made in favours of the Heirs of the Marriage, becauſe there the Heirs muſt repreſent the granter, and ſo muſt fulfill his deed, ſo where the Proviſion is made to Bairns of the Marriage, yet Creditors were preferred to them in the caſe of *Bannerman* of Elſick *contra Hayſtoun*. But upon the 3. *July* 1673. in an Action, *Gordon* contra *Frazer*: The Lords found, that a right to Moveables made by the Father to his Children, was reduceable at the inſtance of Poſterior Creditors; though it was made in ſatisfaction of the Mothers Contract of Marriage, except the Children would alledge that the Father was not Bankrupt, but had an ſufficient Eſtate to pay the purſuers; for they thought it much more reaſonable, that the Children ſhould loſe by their Father, than the Creditors.

And yet if the Father was a notorious Bankrupt and in Priſon for Debt an Aſſignation granted by him for payment of his Daughters Portion who was Married when he was in that Condition, was not ſuſtained as a ſufficient onerous Cauſe, tho' it was alledged that it was made *ad ſuſtinenda onera matrimonii* in favours of a Daughter who had been provided to 25000 merks by her Mothers Contract of Marriage 23. *November* 1680. *Wood* contra *Reid*, and the ſame concluſion would hold tho' ſhe had been Married before the Father was notorious Bankrupt, albeit the Deciſion bears that *Reid* having Maried her when the Father was in under condition, he was underſtood to have Married her *cum periculo* of the Fathers Debts.

It has been contraverted, whether a Right made by a Father to his Son in Law for a Tocher, be reduceable by an anterior Creditor, and if this be allowed in all caſes, men may eaſily prefer their Children to their Creditors; and it would appear, that at leaſt the Right ſo made, ſhould only be eſteemed onerous *in quantum* it extends to ſuch a value, as may be a ſuitable Tocher, for ſuch a mans Daughter, or elſe it ſhould be repute onerous, in ſo far as may anſwer to the Joynture given by the Husband, or to the aliment that he is oblieged to beſtow upon her *ſtante matrimonio*, though he be by Contract oblieged to no Joynture, nor hath any Joynture to give her, *& ita dos eſt titulus oneroſus, ex parte mariti, quia datur pro oneribus matrimonii, ſuſtinendis l. pro oneribus C. de jur. dot. ſed ex parte uxoris dos, eſt titulus lucrativus. l. qui liberos ff. de ritu nuptiar. l. fin. C. de dotis* πανυ θυγατρος μετριβλαβη δωτιων δοκει προικα απαιτειται. *Baſilic. l.* 25. §. 1. *hoc tit.* And upon the other hand, a Joynture to the Wife is *titulus oneroſus*, in ſwa far as it is ſuitable to the Husbands Eſtate, as was found *Novemb.* 16. 1665. *Wat* con. *Ruſſel.* But if the Husband ſhould diſpone all his opulent Eſtate to his Wife, as a Joynture, I think it might be reduced to a third, at the inſtance of prior Creditors, both becauſe a Tierce is the Proviſion, that the Law allows a Wife if there be no proviſion;

and ſo is the legal *quota*. And becauſe Rights made by a man upon Death-bed, to the prejudice of his Heir, is reſtricted to a Tierce; but if the Contract bear, the Land to be diſponed to the Son in Law for Love and favour, that narrative proves *titulum lucrativum*, tho' really no other Tocher was beſtowed; and tho' a Joynture was given, as was found betwixt *Graham* and *Stewart*.

How far a Wife is Creditrix by her Contract of Marriage, and may reduce Poſterior deeds as done in defraud of it, is debeateable in many caſes, as to Heritage; but theſe fall not properly under this Act, but under the Act 105. *Par.* 7. *Ja.* 5. And as to the Husbands Moveables, I ſhall only mention one caſe, *viz.* *Campbel* coutra *Campbel*, *Decemb.* 1674. which was this; *Campbel* by his Contract of Marriage, provided his Wife to the half of the Moveables, that ſhould pertain to him at his Death, & a little before his Death, he diſponed many of his Moveables to his Brother; whereupon the Relict raiſes a Reduction of that Diſpoſition upon this Statute. To whſch reaſon of Reduction, it was anſwered, that the reaſon was not relevant for the Relict was only Creditrix by this Contract, as to what Moveables ſhould belong to the Husband at his Death, which was but κλῆρονομια κατέλπις, & *ſpes ſucceſſionis*, but did not hinder the Brother to Diſpone at any time, in his *liedge pouſtie*, upon any part of his Moveables. And as ſuch Clauſes providing a Wife to the third of the Moveables, were moſt ordinary, ſo if this were ſuſtained, the Husband could not giſt to his Brother, or Relations, any Horſe, or any thing elſe. To which it was replyed, that if ſuch Diſpoſitions were ſuſtained, the former, or the like Clauſes would be Eluſory, and might eaſily be evacuated; for a Husband might Diſpone a little before his Death all his Moveables: this was not decided But the Lords inclined only to ſuſtain this Diſpoſition, if made for ſome probable Cauſe: but if it had been made upon Death-bed, it was Reduceable, or if there had been great preſumptions of fraud adduced to clear, that it was contrived as a meer cheat againſt the Relict. But were clear, that if the Donation, was only of one particular thing made *in leidge pouſtie*, it could not be quarrelled upon this Act. It may be doubted, if when the onerous Cauſe, expreſt, is not true, or if there be no onerous Cauſe, but that the Right granted bear expreſly to be for love and favonr: if in either of theſe caſes it be not lawful to the granter to aſtruct his Diſpoſition, when quarreled upon this ſtatute, by offering to prove, true and real onerous Cauſes, prior to the Debts whereupon the Reduction is founded. And firſt, it is without all doubt, that if the Right bear no Cauſe, the uſer may condeſcend upon, and offer to prove the true and onerous Cauſe. 2. I find it decided, that where the writ did bear only love, aud favour, tho' granted by a man to his own Wife; ſhe was allowed to aſtruct it, by founding it upon her Contract of Marriage, and aſcribing it to make up the defects of the Lands, provided to her by her ſaid Contract. *January* 1669. La. *Brae*, contra *Chiſholm*. 3. Where the Diſpoſition did bear love and favour, and other onerous Cauſes: The receiver of the Diſpoſition was admittted to aſtruct the Diſpoſition, by proving an onerous Cauſe adequat to the worth of the Land. In the caſe *Naper* contra *Ardmore*: which Deciſion may be debated, for why was love and favour inſert, if the Cauſe was adequat, and this was a great preſumption of the fraud, eſpecially in a Diſpoſition by the Father to the Son, for tho', *utile per inutile non vitiatur*. And that this might have proceeded *ex ſtilo*, yet in ſuſpect caſes, where it is known that narratives are much conſidered, theſe Arguments are but weak. 4. Where the Writ bears an onerous Cauſe, and that the Cauſe can only not to be proven. Then it ſeems reaſonable that the perſon to whom it was granted, may aſtruct his Right, by offering to prove that there was other ſums juſtly reſting to him. 5. If the Diſpoſition bear an onerous Cauſe; but if it be proven expreſly, that the Cauſe expreſt is not true, but is calumniouſly, and fictitiouſly expreſt; I would conclude, that the uſer ſhould not be allowed to aſtruct

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another true Cauſe, and that in *in odium falſi & calumniæ* : even as if the date of an execution, or other diligence, be found to be falſe ; the uſer is not allowed to aſtruct the ſame, by condeſcending upon another true date, and abiding at it.

Without true

THe Doctors alſo condeſcend upon a third kind of Title, different from both a lucrative, and an onerous Title ; and this they call a mixt Title, *titulum mixtum*, *l. apud Celſum §. authoris ff. de except. doli. vid. Jaſon ad l. nemo poteſt ff. legat* : and an inſtance of this given in an Alienation made in defraud of Creditors, for leſſe than the true price. And even in this caſe, Reduction is competent for the Creditor prejudged, in ſo far as the price received is below the true value: and thus *l. 7. Baſil. k. t.* εἰ πρὸς περιγαφὴν δανειςὸν μὴ ἐλάττονος πωλήσῃ ἀγρὸν, ἀναῤῥηθήσεται ὁ πραχθεὶς καὶ μὴ ἀναδεχθῇ τιμὴν, *ſi in fraudem Creditorum meorum, minore pretii fundum vendidero, revocatur quod gestum eſt, etiam non reddito pretio*, but ſince *licet contrahentibus in emptione & venditione ſe invicem decipere.* and that we ſee prices of Land very different, every man taking his advantage. It may ſeem ſtrange, why the Law ſhould prejudge ſo far the Buyer in this caſe : and I conceive, that except the price be palpably made ſo low, upon deſign to cheat Creditors, (any of the Creitors having offered more) or that it is extraordinary low in it ſelf ; ſuch prices cannot be challenged. As if a chalder of Victual, worth truly 3000 Merks, were ſold for 2000 Merks : But yet I think not that it behoved to be *ultra dimidium*, below the juſt half ; for then it might have been reduced by the Civil Law upon another head, and ſo this Action had been unneceſſary,

Whether if any Debitor buy a hazard (*jactum retis*, as Lawyers call it) *v. g.* if he buy a womans Life-rent at ſeven years purchaſs, and diſpone his Land for the price : if ſhe die the next year, may not I reduce that Diſpoſition, as done to the prejudice of me a lawfull Creditor ; even as a Minor might reduce ſuch a bargain, if made by his Tutors. To which I conceive it may be anſwered, that it cannot be quarrel'd, if it was made in the ordinary way, and for the ordinary advantage, for which a man would have tranſacted it, if he had no Creditors, and if no deſign to defraud, can be ſhown : and here that maxime holds, *fraus, & eventum & conſilium requirit* : nor are the Leidges put in *mala fide* to Contract with Debitors in ſuch caſes.

Without juſt.

IT is not ſufficient, that the price or cauſe be onerous, but it muſt be juſt ; that is to ſay, a price which the Law allows ; as for inſtance, if a man ſhould looſe a great ſum at Game, and for payment of it, ſhould diſpone his Lands, that Diſpoſition might be quarrel'd as made without a juſt price, becauſe the Law allows not the payment of what is gained at Game, if it exceed 100. Merks Scots. And ſince the Law would not ſuſtain Action for it, at the Gainers inſtance againſt the Debitor who looſed it, much leſſe ſhould it ſuſtain a Diſpoſition for payment of it againſt the Creditors, and yet this may be ſaid to be an onerous Cauſe ; for the looſer hazarded as much of his own, againſt what he gained. and ſo this Game was but the return of his Money : and like to *emptio jactus retis.* And though it may be alledged, that by the

14. Act. 23. Pa. *Ja.* 6. The ſuperplus of what is gained at Game above 100. merks is ordained to be conſigned for the poor of the *Pariſh*. And ſo the Diſpoſition made for payment of it, muſt accreſce to them; and is ſtill an onerous and neceſſary Debt, *quoad* the looſer, and conſequently is not reduceable at the inſtance of his Creditors; yet I conceive that ſuch a Diſpoſition would be reduceable at their inſtance, as not made for a juſt Cauſe, ſince it is made for a Cauſe, upon which the Law would not allow Action. And the Civilians number, what is gained at Game, amongſt lucrative Cauſes. *Bald. ad l. i. C. ſi. quid in fraud*: *Patron.* And generally what is acquired unlawfully, is by them ſaid to be acquired, *titulo lucrativo*, *Jaſon hic num.* 8. & thus Diſpoſitions granted *ob turpem cauſam*, *&c.* may be ſaid to be reduceable alſo upon this Statute, as granted without a juſt and onerous Cauſe: according to them; as is granted without a juſt Cauſe, to ſpeak in the terms of this Act. And I think, we ſpeak more properly than the Civilians here, for what is gained at Game, rather wants a juſt Cauſe than an onerous Cauſe.

And neceſſary Cauſes.

Diſpoſitions made to conjunct or confident Perſons may be quarrelled, tho' they be made for a juſt and onerous Cauſe; if they be not made for a neceſſary Cauſe. For it may be fraudulent, and be deſigned to prejudice Creditors, except the Cauſe be neceſſary, tho' it be onerous. As for inſtance, if a conjunct, or confident perſon, knowing that his Debitor intends to fruſtrat his Creditors, and to go out of the Countrey, and yet preſuming that a Right granted for an onerous Cauſe cannot be quarrelled, ſhould ſo far comply with his fraudulent deſign, as to buy Land from him, and to pay him the price upon that deſign, ſuch a tranſaction may appear to be fraudulent, and lyable to be queſtioned upon this Act; and theſe words of it, *without true juſt and neceſſary Cauſes.* I find alſo that the Laird of *Tarſappay* having diſpon'd his Eſtate to the Laird of *Kinfauns* his Nephew, there was a Reduction of the ſaid Diſpoſition raiſed upon this Act of Parliament, as being made by a Bankrupt to his Nephew without an onerous, at leaſt a neceſſary Cauſe, in ſo far as tho' the Diſpoſition was made to *Kinfauns* the Nephew for payment of ſeveral Creditore to whom *Kinfauns* had engaged himſelf; yet there was no neceſſity upon *Kinfauns* to have engaged himſelf to thoſe Creditors, and ſo his interpoſing for theſe Creditors unneceſſarly who had done no diligence, could not prefer them to other Creditors who had done diligence. To vvhich it vvas anſvvered, that *Kinfauns* the Nephew finding no diligences done at the inſtance of the Creditor he was *in bonâ fide* to take a Diſpoſition to his Uncles Lands with the burden of Debts owing to other Creditors equivalent to the value of the Lands; ſo that tho' the Diſpoſition was made to him as a conjunct perſon, yet it was not without an onerous Cauſe. And as to the Reaſon of Reduction that *Tarſappy* was *Bankrupt*, becauſe there were many Hornings againſt him. It was anſwered, the Act of *Parliament* determines not what is a *Bankrupt*, but annuls only deeds done without an onerous Cauſe; and deeds done in prejudice of Creditors who have done diligence, neither of which can be alledged in this caſe: And tho' if there had been Horning or Diligence raiſed at the inſtance of any Creditors, *Kinfauns* could not have taken a Diſpoſition for payment of other Creditors, except he had been bound for theſe other Creditors prior to theſe diligences, yet in this caſe where there was no diligence, it was lawful to him to take the ſaid Diſpoſition, ſince this Creditor had

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uſed no Diligence, and no buyer was ever obliged to look the Regiſters of Hornings. The Lords upon this debate reduced the Diſpoſition, becauſe there were many Diligences raiſed againſt *Tarſappy*, tho' this Creditor had uſed none, and that *Tarſappy* was in the Abbey when he made this Diſpoſition 18. *Decem.* 1673. But it ſtill remains as a doubt whether as a perſon may receive a Diſpoſition notwithſtanding of an Inhibition of the Debitor inhibited was ſpecifickly obliged to grant that Diſpoſition prior to the Inhibition, ſo may not a conjunct perſon accept a Diſpoſition from a Bankrupt, for implement of Obligations in vvhich the granter vvas obliged prior to any diligence raiſed by other Creditors, ſince that Obligation may be juſtly ſaid to be granted for a neceſſary Cauſe, and not preferring fraudulently one Creditor to another.

To have been from the beginning; and to be in all time coming, null, and of none availe, force, ſtrength, or effect; by way of Action, Exception, or Reply, without any further Declarator.

BY this Paragraph of the Statute, the nullity ariſing from this Statute, is receiveable by way of exception, as well as action, *ope exceptionis*, as our Practick terms it: and this was introduced in favours of the Purſuer, who is leiſed by the fraud, whoſe advantage it is to have his intereſt ſuſtained to him any way, and ſo to have his diligence thus ſhortned.

For the clearer underſtanding of theſe words, we muſt conſider, that by the common Law, nullities are either ſuch as are received *ipſo jure*, or *ope exceptionis*. That is ſaid to be null, *ipſo jure* where the thing is declared null by any expreſſe Law, as this is by this Statute, *quod contra legem fit, pro infecto habetur, & ipſo jure nullum eſt. l. non dubium C. de legib*: that was *nullum ope exceptionis*, which was not receiveable, except the nullity had been proponed, by him to whom it was competent. But in our Law *nullum ipſo jure & nullum ope exceptionis*, are the ſame, *& termini convertibiles*. and with us the oppoſition is betwixt *nullum ope exceptionis, & actionis*; the reaſon of which difference proceeds from the favour deſigned by the Law, *quoad* the form of procedure. For if any thing be null by way of exception, it is received ſummarly againſt the purſuite, without raiſing an Action of Reduction, or Declarator: but what is only null by way of Action, needs Proceſs of Reduction, or Declarator. By the common Law, either a Penalty was not adjected to the prohibitory Law, but the thing was ſimpliciter prohibited, and theſe things were *ipſo jure* null. But if the Law proceeded further, and adjected a Penalty; then either the Penalty was adjected to the annulling of the deed: and then the deed whereby the Law was contraveened was null, and the Penalty was alſo due, or elſe the deed was declared null, but ſo that it was ſome way allowed to ſubſiſt, but a remedy was appointed, and then it was not null *ipſo jure*, but was reduceable by the way appointed; according to the principles of the common Law, this nullity was receiveable *ipſo jure*, for *quod contra legem fit, id ipſo jure nullum eſt.* But ſo it is that this alienati-

on in defraud of Creditors, was declared null by the Law, and by this Statute being declared null, that nullity ſhould be receavable *ope exceptionis*. and yet by our Practice the nullity ariſing from this Act, is oftimes received only by way of Reduction, whereby the Lords have receded from the expreſſe words of the Law; and the only reaſon I can give for it, is, that the Author or Diſponer muſt be called to maintain his Right; which could not be if the nullity were receiveable *ope exceptionis*: and if the Diſponer were called, he might eleid the purſuite, by alledging that the Debt, to the prejudice of which his Right was ſaid to be granted, was payed, or diſcharged, or became extinct by compenſation; neither of which could be known to the receiver. And yet I find in ſome caſes, this nullity receivable, *ope exceptionis*, *v. g.* If the Right bear, to be for love and favour; for here there needs no Probation that it is fraudulent, and it is a principle, that where the nullity is founded upon Law, and the ſubſumption is inſtantly verified, that *eo caſu* the nullity is receiveable *ope exceptionis*. And in my humble Opinion, wherever the Fraud can be inſtantly verified, it ought to be received *ope exceptionis*, the former and ordinary reaſon, *viz.* That the Diſponer ſhould be called, becauſe he may alledge the Debt to be payed, ſeems not to be good, becauſe that nullity is not competent to be propon'd by way of exception, but where there is a competition betwixt the Creditor, and confident perſons, both pretending right to the Lands and o-others *D*iſponed, which cannot be but where the Creditor has compriſed; and tho' before compriſing, the Creditor ought to cite the Diſponer in his Reduction, which is *proceſſus executivus*, and previous to, and in order to execution by compryſing: yet after ultimat execution by compryſing, it is not neceſſary the Debitor ſhould be cited upon that pretence, that he may queſtion the Debt as ſatisfied. 2. I find that Diſpoſitions of Moveables, have been found null by way of Exception, tho' Heretable Rights are not found null without Reduction or *D*eclarator, and thus it was decided. 16. *June*, 1671. *Bower* contra the Lady *Coupar*: The reaſon of which diſtinction muſt proceed from this, *viz.* that *mobilium vilis eſt poſſeſſio*, κτα αφαν as the *Greek* calls it, and therefore the Law requires not ſo much ſolemnity to their conſtitution, nor deſtitution, or revocation. 3. I find, that where the Right quarreled, is *parvi momenti*, the Lords admit the nullity to be receiveable, *ope exceptioni*s, 5. *January*, 1669. But here the parties were poor, which I find they do alſo in nullities *ex capite inhibitionis* &c. in ſmall matters, and betwixt poor parties, *nam de minimis non curat lex*, *& de minimis ſummariè jus dicit prætor*. Since there the ſubject mater is not able to bear large expences. 4. I have obſerved, that where the nullities did ariſe *incidenter* from another purſuit, depending, that there it was received, *ope exceptionis*, leaſt the other Proceſs ſhould ſiſt, as was found in the caſe *Haliburton* contra *Moriſon*. Where a Reduction being intented, at *Haliburtons* inſtance, of *Moriſons* Right, *ex capite inhibitionis*, it was alledged that *Moriſons D*iſpoſition depended upon a Right prior to the Inhibition. To which it vvas replyed, that that Right was null by the Act, 1621. Upon vvhich debate the Lords ſuſtained the quarrelling of this Right, by way of reply. But I ſhould rather think, that where the Right is betvvixt moſt confident perſons, ſuch as Father and Son, that *eo caſu* the nullity ſhould be receiveable by vvay of exception, both becauſe the Cheat is eaſieſt, and moſt unfavorable: and becauſe the Father, or very near Friend might have made all concur vvillingly to defend the Right, vvithout the neceſſity of being called, vvhich is the reaſon vvhy Reductions are ſo neceſſary in other caſes.

And

And in caſe any of His Majeſties *good Subjects (no wayes partakers of the Fraud) have lawfully purchaſt any of the Bankrupts Lands, for a juſt and competent Price,* &c.

IT is much debated amongſt the Doctors, if *Actio Pauliana* be *Actio realis*, or not. The Gloſs and ſome Interpreters aſſert it to be only a perſonal Action: And they conclude ſo, becauſe the Poſſeſſor of what is alienated in defraud of Creditors, is not lyable to this Action, except he be *particeps fraudis*, or elſe have acquired the thing ſo alienated without any onerous Cauſe, that it is not the poſſeſſion, but the deed of the poſſeſſor that is conſidered. Our Law agrees in this with the Civil Law, for by this Paragraph it is ſtatute, that all who have acquired the thing alienated in defraud of Creditors, ſhall not be lyable to this *Reduction*, but ſuch only as are partakers of the fraud, and have not payed a juſt price to the interpoſed Perſon. As for inſtance, one diſpones his Eſtate to his other Brother, or *Brother* in Law, without any onerous Cauſe, which *Brother* Diſpones it again to a Stranger who knew nothing of tde Fraud or Relation; and who pays a juſt and adæquat price for it. In which caſe, a prior lawful Creditor may reduce the firſt alienation made to the *Brother*, but he cannot reduce that Alienation that is made by the *Brother* to the Stranger: And yet if that Stranger did either know the Relation, or that the firſt conveiance was fraudulent (which the Act calls the being partaker of the Fraud) or if he payed not an adequat price, then and in either of theſe caſes, the Creditor may reduce even the Diſpoſition made to the ſtranger. He is ſaid to be partaker of the Fraud, to whom it was intimate by the Creditor, that he ſhould not buy, *l. ait prætor ff. hoc tit.* which is founded upon excellent Reaſons, and would certainly hold in our Law; tho' I remember not that it is already ſo decided. For this intimation would take away the *bona fides*, upon which the priviledge granted by this Act to ſingular ſucceſſors is founded.

But the third parties knowledge, that it was to the behove of the Bankrupt or of the confident, is ſtill ſufficient to take from him the benefit of this Clauſe; which being granted, becauſe of the third parties *bona fides*, cannot reach to ſuch, whoſe knowledge put them in *mala fide*, as was found 22. *June* 1669. *Hamilton* contra *Hamilton*, and the *Viſcount* of *Frendright*.

As alſo, if the Diſpoſition made to the firſt receiver, whom this Act calls the interpoſed Perſon, did bear love and favour, and was made to a confident Perſon; in that caſe, the Right is reduceable. For in that caſe, the third Perſon buying, ought to have known the nullity, *& ſcire, & ſcire debere æquiparantur*: And this was found in the Reduction of a Tack, 6. *February* 1672, *Hay* contra *Jamiſon*. Though that Tack had paſt thorow many hands, and to ſingular Succeſſors, who had acquired their Rights for onerous Cauſes. As alſo, if the Right diſponed to the third Partie, did bear the Relation, or if he knew it, he who acquires the Right is obliged to Inſtruct the onerous Cauſe, and ſo ſhould get up the Inſtructions of it for his own Security, which, the Lords found, he is obliged to produce for proving thereof 24. *January* 1688. *Crawfurd* contra *Ker*; for though it may be

contended, that the Third Party cannot be ſaid to be *particeps fraudis*, in this caſe, yet this Clauſe ſecures not ſuch as acquire from conjunct perſons, where they are not *participes fraudis*, but ſecures only Acquirers from confident perſons, who are not *participes fraudis*, & the Reaſon of the difference is, becauſe the Acquirer cannot know one to be a confident, except he himſelf be *particeps fraudis*, but he may know one to be a Relation without being *particeps fraudis*, and ſo it was neceſſary to oblige ſuch to prove the onerous Cauſe in the firſt Right, betwixt thoſe Relations, ſince they knew the danger. And if this were not requiſit the Relation and conjunct Perſon might make over his Right ſecurely to a third Party, which would diſappoint altogether this Remedy introduced in favours of the Creditors.

I have heard it debated, that though a third Perſon, who acquires a Right from the Perſon interpoſed, for an onerous Cauſe, be not lyable to this Action; yet a compryſer, compryſing this Right from the interpoſed Perſon, had no ſuch priviledge. As for inſtance, a Right made by one Brother to another without an onerous Cauſe; is reduceable, and therefore if one of the Creditors of that Brother, to whom the Right was made, ſhould compryſe the Right ſo made to him: It was alledged, that as this Right would have been reduceable, in the Perſon of the firſt Acquirer, if it had continued with him; ſo it would have been reduceable from the Compryſer; and that for theſe Reaſons, 1. A Compryſer compriſes only, *omne jus quod in debitore erat, tantum, & tale*: and therefore ſince it was reduceable in his Debitors Perſon, it ought to be ſo in his, even as it had been reduceable from his Creditor, *ex capite Inhibitionis, aut interdictionis*, &c. 2. The expreſs words of the priviledge, given by this Paragraph, does not meet this caſe, for the words run thus; *if any of His* Majeſties *good Subjects, ſhall by lawful bargains purchaſe*. But ſo it is. that he who compryſes, cannot be ſaid to purchaſe by way of bargain; but though a compryſing be a legal Diſpoſition, and Aſſignation, yet it is a ſale by the Judge, and not a purchaſe, or Contract amongſt the Parties. 3. This caſe ſeems not to fall under the reaſon of the Act; for the Act priviledges ſuch, as having a good ſecurity, do in contemplation of that Right, (which for ought they can know, is ſufficient) lay out their Money, & ſo follow the faith of that Right, in the firſt conſtitution of their Debt. But the Compryſer lent his Money to his Debitor, without ſhewing that he relyed upon the Right now quarrelled, but finding thereafter that he could not recover his Debt, he compryſed any thing he could find. 4. If this were allowed, it would open a wide door to fraud; for Rights might be made to confident Perſons, and then might be compryſed; which any Creditor might be induced to, whereas few would adventure to buy originally theſe Rights, as ſaid is, This caſe was debated in *July*, 1666. betwixt *Jack* & *Jack*, but was not decided: and it did divide the opinions of very able Lawyers.

It may be doubted alſo, whether if the receiver of the Right from the interpoſed Perſon, knew not that the Right was fraudulent, the time of the alienation, but knew before he received the thing ſold, that the firſt Alienation was fraudulent, this Right be reduceable, or not. And it ſeemes that if he knew either at the time of the Vendition, or Tradition, that the Right was fraudulent, that he is *particeps fraudis*, and ought not to have the benefit of this exception: for *traditionibus. & non venditionibus, tranferuntur rerum dominia*, and ſo he cannot be ſaid to purchaſe a Right, *bona fide*, who knew before Tradition, the fault of the Right Diſponed, and he might have kept the price in his own hand till Tradition, and ſo needed not have been prejudged. Likeas, it is a principle in Law, that *bona fides requiritur in emptionibus; & tempore contractus, & tempore factæ traditionis l. 2. ff. pro empt. & l. Fin. ff. pro ſolut.*

Though

Though the Doctors give as a Rule that such Alienations are reduceable, as are made without an onerous Cause, and where the receiver is *particeps fraudis*: Yet they except two cases from this Rule, First, deeds done in prejudice of the Fisk, or of a City, or Incorporation, which they declare reduceable, tho' the receiver was not *particeps fraudis*, *l.* 2. *C. de debitore Civitatis.* But I think this most unreasonable; nor would it hold in our Law: for as the Act makes no Exception in favours of the Fisk, so in *dubio*, *semper contra fiscum respondendum.* And since this third Party is only privileged, because of his *bona fides*, I see not why he should be prejuged by the *mala fides* of his Author: or why he should loose his privilege where he can alledge his *bona fides.* The second Exception is in favours of a Patron, who might revoke the Goods sold, though the Buyer was not *particeps fraudis. l.* 1. *ff. si quis in fraudem patro*: but in that case he was lyable to pay the Price, *ibid.* we have no use for this in our Law. And yet by our Law, Masters have such a *tacita hypotheca*, in the Farms that grew upon their own Ground, that they may reduce any Disposition made thereof, even to a Buyer who was not *particeps fraudis.*

So favourable likewise are singular successors, who are not *participes fraudis*, that a Tack being craved, to be reduced *ex capite fraudis*, as granted and delivered blank *quoad* the Issue or endurance, and in the Blank, eighty one years being filled in: Whereas nineteen years were only communed upon; this was found relevant to reduce the Tack *quoad* the Tacksman, who had acquired Right to the Tack, but not *quoad* a singular Successor, for an onerous Cause, without being *particeps fraudis.* First *Decemb.* 1671. *Crichtoun* contra *Crichtoun* and *Hannans*: and a Disposition being craved to be reduced, as granted by a person who was only a Trusty, having given a Back-band; the Disposition, though made as said is, to a singular Successor, was found to be reduceable, if the Right was made without an onerous cause; or that the singular Successor knew of the Disponers Back-bond; though it was but a personal Obligement, and not in *gremio juris*; and consequently could not in Law have otherwise affected a singular Successor. 20. *Novemb.* 1672. *George Workman* contra *John Crafurd.* And it has been often found in our Law, that though Gifts of Escheat, taken to defraud Creditors, be reduceable in the persons of such as took them; yet they are sustained, when established by Assignations in singular Successors, no ways partakers of the Fraud: And an Assignev is not obliged in Law to suffer his Cedent to swear in his prejudice, if his Assignation be made for an onerous Cause; but if either the Assignation be granted without an onerous Cause or be made upon design to preclude the Debitors from these just Remedies: then whatever is competent against the Cedent, is competent against the Assigney; so that we may establish this general Rule, *viz. participes fraudis*, have never the privileges competent to singular Successors.

If the Disposition has been made to the interposed person, for payment of a Price, but the Price is not equivalent to the thing sold, then in so far as the thing exceeds the Price, the Disposition will be reduced, but it will stand in *quantum*; even as a Disposition made to a conjunct person, will be valid in so far as it is onerous, for in neither of these cases is the Disposition absolutely revokable. But either the conjunct Person in the one case, or the singular Successor in the other, will be obliged to make up the true and just Price, as was found in the former case, *Henderson* contra *Anderson*, and the 17. *January* 1632. *Skeen* contra *Betson*, which is likewise more fully clear by these words of the Act, *viz.* Providing always, that so much of the saids, Lands, Goods or Prices thereof, so trusted by Bankrupts to interposed persons, as hath been really payed, shall be allowed unto them, they making the rest

forth-coming to the remanent Creditors: And the reaſon of this is, becauſe the Law did not abſolutely oppoſe the Alienation; but only did reprobate it, in ſo far as it was done to the prejudice of Creditors. And therefore, the Law reſolving not to purſue its revenge, further than its Deſign, did reaſonably ordain, that theſe Diſpoſitions made in defraud of Creditors, ſhould only be quarrelable, in ſo far as the Price was not equivalent, this likewiſe is fit for Commerce; which is never reſtrained in ſo far as is abſolutely neceſſary: and this is very ſuitable to the Analogy of Law in other caſes; for thus, according to the common Law, he who had taken an Obligation for more Annualrents than the Law allowed, did not thereby looſe all his own Annualrents, but only looſed them in ſo far as they exceeded the *quota* preſcribed by Law, *l. Placuit ff. de uſuris.* And a donation bearing a greater Sum than the Law allowed, when the Donation was not inſinuated or regiſtrated, did not loſe the whole, but only, *quatenus ſuperat definitionem legis. l. ſancimus C de donat.* And in our Law, though it be by expreſs Statute appointed, that Tacks ſet by inferior beneficed Perſons, without the conſent of the Patron, for longer than three years, ſhall be null; yet *quoad* theſe three years they are ſtill ſuſtained, and are not annulled *in totum.* And albeit by another Statute, all Bonds and other Writs not ſubſcribed by the Party, or two Notars for him, be declared null, if exceeding one hundred Pounds. Yet tho' granted for a greater Sum, it will be valid, if he to whom it was granted, reſtricted it to an hundred Pounds: And though Witneſſes can prove nothing above an hundred Pounds; yet though the Sum craved be greater, the Purſuite will be ſuſtained to be proven *pro ut de jure*, if reſtricted to an hundred Pounds. And yet I confeſs; that theſe Arguments from Analogy, do not in this abſolutely hold, for in ſeveral of theſe inſtances, the Deeds ſpecified *habent individuam formam*, preſcribed to them by the Law, *& ubi actus eſt individuus, ratione Formæ, eâ non ſervata, actus omnino corruit, & utile per inutile vitiatur.* But the Arguments taken from Donations, *& ab uſuris quadrat* with this caſe, or at leaſt the Argument *ab uſuris* does.

But the Receiver of the Price ſhall be holden to make the ſame forth-coming to the Bankrupts true Creditors, for payment of their lawful Debts.

THough the interpoſed Perſon be *particeps fraudis*, yet he is not by the Act, lyable to reſtore the Land, or others diſponed to him ſimply, or the Price thereof, if he has diſponed, the ſame to a Third Perſon: But there will be deduced, or allowed to him, ſo much either of the Land, or Price, as he has given, or payed to lawful Creditors: and the Superplus is to be forth-coming to the other Creditors, who wants their due payment; and that not without new Diligence, by theſe who have reduced the Right granted to the interpoſed Perſon, by Arreſtment, or otherwiſe. But if the Creditor who has prevailed in the Reduction, had not done diligence to affect the Land, or Price, in the hands of the interpoſed Perſon, either by Comprvſing, or Arreſtment, he muſt notwithſtanding the Decreet of Reduction, affect the ſame: Otherwiſe, other Creditors doing Diligence, will be preferable

ferable, ſeing Reductions do not ſettle a Right upon the Creditors to their Debitors Eſtate, but they only ſweep away ſuch fraudulent Rights, as may ſtand in the way of their Diligence, and Execution; and hinder them thereby to get a Right to the Debitors Eſtate.

And it ſhall be ſufficient Probation *of the fraud intended againſt the* Creditors, *if they, or either of them, ſhall be able to verifie by* Writ, *or* Oath *of the* Party Recever *that the ſame was made without any true cauſe,* &c.

FOr clearing of theſe Words, it is fit to know, that the Word *Fraud*, is variouſly uſed by Lawyers; *Veteres, Fraudem pro Pœna ponere ſolebant. l. cum autem § 2. ff. de ædilit. edicto.* It is taken *pro periculo alicujus incommodi. l. 1. ff. ad leg. falcid. pro noxâ & delicto. l. aliud eſt fraus ff. de verb. ſignif. Fraudare, pro privare. l. 2. ff. De his quæ inteſt. delent.* But here, *Fraud* ſignifies the prejudice ariſing to the Creditors by unlawfnl Alienations, and even in the Civil Law it was taken *pro damno pecuniario. l.* 18. *§. 1. in fin. ff. de judi. l.* 33. *§. 2. ff. ex quib. cauſ. maj.* And he is ſaid to defraud his Creditor, who prejudges him by that Alienation, without neceſſity of proving any previous deſign of Cheating; for that deſign being a Secret and latent Act of the Mind, the Law which deſigned mainly the Indemnity of the Creditor, would not burden him with ſo narrow, and difficult a Probation. But *præſumptione juris, & de jure*, concluded, that Alienation to be made in defraud of Creditors, which wanted an onerous Cauſe: and this is *fraus in re*, though not *in conſilio.* And Lawyers have well diſtinguiſhed, *fraudem in re, à fraude in conſilio, Accurſ. ad §. in fraud. juſt. quib. ex cauſ. manum.* which is ſuitable to the Diſtinction uſed by the Law it ſelf, in the Title, *de dolo. Inter dolum ex propoſito, & dolum ex re ipſa*: for *fraus, & dolus*, differ only, as *Genus, & Species. Fraus* being more general than *dolus*, as is fully proved by *Bargalius, de dolo lib.* 5. *c.* 4. But albeit the Civil Law makes Alienations *in conjunctam perſonam*, to be only ſufficient Probation, *ſi aliæ præſumptiones concurrant, l. ſi quis C. de bon. damnat. Burgal. de dol. c.* 8. *l.* 5. *num.* 43. Yet our Law makes the want of an onerous Cauſe, *per ſe*, though nothing concur, to be a ſufficient Probation of the Fraud, againſt a conjunct, or confident Perſon. And albeit by the Civil Law, *fraus, & eventum & conſilium deſiderat.* ἡ ἀπάτη καὶ ἀποτέλεσμα, καὶ σκέψιμα σπιζῆται. *l.* 79. *Baſil. de reg. juris. & l.* 15. *Baſil. h. t.* Yet our Law requires only *fraudem ex eventu*, without conſidering whether there was *fraus in conſilio*; for albeit he who received the Diſpoſition, knew not that the Diſponer had Debt, or Creditors: Yet if the Eſtate of the Diſponer was not able to pay his Debt, our Law will reduce that Diſpoſition, if made without an onerous Cauſe; which is alſo expreſly contrair to *l.* 6. §. 4. *Baſil. h. t.*

quæ in fraud. cred. ὁ ἐν εἰδήσει τε ἀπατᾶσθαι τὰς δόσεις ἀς ποιᾶν τι πρὸς βλάβην ὑπ. πίστεως οὐχὶ ὁ ἀγνοῶν. What Probation ſhall be ſufficient in Reductions, upon this Statute, is determined by this Paragraph; and though the Statute appoint the Probation to be by the Oath of the Party Receiver, or by Writ, bearing no onerous Cauſe, or bearing to be for Love and favour; yet the Practice has in this point ſo varied, that it will be fit to reduce our preſent Deciſions into theſe Concluſions. 1. Narratives, bearing the Diſpoſition to be for true and onerous Cauſes, being but the Aſſertion of the Party Granter, does not prove the Cauſe to be onerous; elſe it would be very eaſie to elude the Act. 2. Though the Narrative does not prove for the Granter, yet it proves againſt him, *nam verba narrativa*, as *Craig* obſerves, *pag.* 145. *licet ſæpe falſiſſima, probant tamen contra proferentem.* And therefore, if the Diſpoſition quarrelled, be made to a conjunct Perſon, and bear to be made for Love and Favour, it will be reduced, though the perſon to whom it is granted, ſhould offer to prove the onerous Cauſe, as was found in the caſe *Stuart* contra *Graham*, nothing can prove better the Deſign of the Partys, than a Writ under their own hands, for as this cannot fail, ſo if the receiver ſhould be allowed to lead a ſubſequent Probation, for proving the onerous Cauſe, contrair to the Writ produced, it is very probable, that he might uſe indirect means for proving the ſaid onerous Cauſe, and this might both diſappoint the Creditors, and open a door to Perjury; *& ſibi imputet*, the purſuer who accepted of a Writ, bearing ſuch an Narrative. And yet there being a Reduction raiſed, of an additional joynture made by Sir *John Falconer* to his Lady, upon this Act of Parliament; The Lords allowed her to prove the onerous Cauſe, before anſwer albeit the Contract bore; to be for Love and Favour, for ſhe being a Woman might eaſily lapſe in taking a Right with a wrong Narrative, but ſhe having only inſtructed this onerous Cauſe by producing Bonds to which her Mother or Siſter had Right, and which were found lying among Sir *John's* Papers; the Lords would not ſuſtain the ſame becauſe there was no Right produced by them thereof to Sir *John*, prior to the additional Joynture; but they would not ſuſtain the Mothers offering now to make a Right, becauſe the Buyer of the Land ſeing the Right null, as made for Love and Favour only, could not be prejudged by making up a Title poſterior to his Right. And thus it ſeems, that *verba narrativa* (which is the Reaſon here preſſed) *probant* only *præſumptivè etiam contra proferentem*, and ſo the Preſumption may be taken off, and elided by a contrary clear Probation; eſpecially where the Writ is granted to Women, ignorant Men, or Souldiers, or even to ſuch as are judicious; if they were abſent. This Deciſion was betwixt *Glenfarquhar* and Sir *John Falconers* Lady, *January* 1688. 3. A Right made by very conjunct Perſons, ſuch as Father and Son, or made to Perſons againſt whom there lies a preſumption of Fraud, either becauſe of the Relation, or becauſe the receiver had no viſible Eſtate, wherewith to acquire *ex titulo oneroſo*, in that caſe, though the Right bear an onerous Cauſe; Yet the receiver muſt prove the onerous Cauſe, otherwiſe than by the Narrative. 4. If the Diſpoſition bear, that the ſame was made for ſatisfying of Debts, owing by the Diſponer, or for ſatisfying a Debt owing to the Receiver: he muſt prove the onerous Cauſe as was found 23. *March* 1624. *Duff contra Kellie*, though the Diſpoſition there, was made only to a Brother in Law, and the reaſon of this ſeems to be, becauſe if there was any antecedent Debt, that Debt may be eaſily proven; and the Lords have proceeded, ſo far according to the preſumptions of Fraud, which have appeared, that where Bonds have been produced, proving the Diſponer to be Debitor, prior to the Diſpoſition; they have yet ordained the onerous Cauſes of theſe Bonds to be proven. Becauſe if confident perſons deſign to cheat their Creditors, they may as eaſily grant Bonds bearing borrowed Money: and then Diſpoſitions for payment of theſe Bonds; as

they

they may ſimply grant Diſpoſitions bearing onerous Cauſes. And as a Minors Diſpoſition would not be found proven to be for an onerous Cauſe, tho' granted for payment of a preceeding Bond, ſo neither ſhould a Diſpoſition granted by a Bankrupt; for a Bankrupt is as prone to cheat, as a Minor is to be cheated. And therefore, if the preſumptions of fraud be very ſtrong, they will ordain the party receiver to inſtruct the onerous Cauſe, even of the preceeding Bond, by the parties who received, and the Witneſſes who were preſent; or elſe will ordain the cancelled Bonds to be produced, or at leaſt the party receiver to depone thereupon, as was found, *December* 1671. *Duff* contra *Colledin*, and *December* 1673, *Campbell* againſt *Campbell*. In which laſt caſe, a vvoman being Creditrix by her Contract of Marriage, as being provided to the half of the Moveables vvhich ſhould pertain to her Husband, the time of his Death, and to 200. Merks out of the other half, purſued Reduction of a Diſpoſition made to her Husbands Brother of his Moveables, vvho defending himſelf by a Diſpoſition, made for an onerous Cauſe *viz.* A Bond granted by his Brother to him, it was urged, that the Brother to whom the Diſpoſition was made, ſhould prove the onerous Cauſes, of that Bond, for tho' the Bond bare onerous Cauſes, yet it is eaſie by ſuch Bonds to cheat Creditors. And it was preſumeable in this caſe, that the Bond was not granted for an onerous Cauſe, ſince payment of Annualrent and Execution was deferred till the granters death. Notwithſtanding of which preſumption, the Lords allowed the receiver to give his Oath upon the onerous Cauſe: eſpecially ſeing it was ordinar for Brothers to ſpare their Brothers, both as to Annualrent and as to Execution: And much more when the Brother who granted the Bond was ſick, and would die ſhortly in all humane probability. Nor did they think fit to burden the receiver with other Probation of the onerous Cauſe, ſince the Diſpoſition bare to be for onerous Cauſes, and the Bond was produced, bearing to be for onerous Cauſes alſo. So that to require a higher Probation backward, was *dare progreſſum in infinitum*. And it was well known that Brothers have ſuch private Tranſactions, Truſts and Lendings, that they pay and receive Money, to, and from one another, without Witneſſes. 5. When Bonds are granted to Trafficqueing Merchants, who are Brothers in Law, or ſuch Relations as are known to be men of integrity; it is hard to put them to prove the onerous Cauſe, otherwiſe than by their Oath, for Merchants and others uſe not to adhibite Witneſſes to all their Bargains, and in many caſes they cannot have Witneſſes to their Bargains, being made abroad, and in remote Countries; and to tye them not to make Bargains with their near Relations (with whom ordinarily they enter into Societies) were to ruine all Commerce. And though Moveables uſe to be tranſmitted without Writ, nor does the Law require any Writ, to their tranſmiſſion; yet in the former caſe of *Anderſon*, the Lords forced him to prove the onerous Cauſe of his *Diſpoſition* to *Howats* Moveables, though he alledged that he could not be in a worſe condition by his having a Diſpoſition, than he would have been without it: but ſo it is, that his Right to Moveables would have been ſufficient without Writ; but here there was a Diſpoſition, but where there is no Diſpoſition, it were hard to reduce a Right made to Moveables, becauſe I could not prove the onerous Cauſe. As for inſtance, If I bought a Horſe, and payed the Money, no Creditor of the Sellers could force me to prove the price to be payed. 6. Sometimes the Lords uſe to ſuffer the receiver, to aſtruct the onerouſneſs of the Cauſes, by one or moe Witneſſes, and to give their Oaths in Supplement, and according as the Relation is remote, or the preſumption of the receivers honeſty ſtrong, they leſſen the neceſſity of the ſtrong adminicles. And thus the 5. *July* 1673. In the caſe of *Margaret Home* contra *Smith*, they ſuſtained one Witneſſes, deponing that he was Witneſs to ſuch a Bond, & that

he heard the granter of the Bond acknowledge that he was Debitor, to be ſufficient adminicles, being joyned to the Defenders Oath of Supplement. And in the caſe above cited, 18. *November* 1669. *Anderſons* Diſpoſition being quarrel'd, as being *omnium bonorum*, and for a falſe cauſe, a great part of the ſum for which it was granted, being payed before the Diſpoſition; yet the Lords ſuſtained the Diſpoſition in ſwa far, as it was granted for Sums owing before the Diſpoſition, to be proven by the oath of *Anderſon* himſelf, and of the perſons to whom the money was pay'd, & for what ſums were pay'd before Diligence at the Perſuers Inſtance, tho' after the Diſpoſition, to be alſo proven by the oath of the common Debitors, and of theſe to whom the Debts were payed: And yet where the Diſpoſition did bear, to be not in general for payment of the Granters Debts, but particularly for payment of the Debts after ſpecified, and ſome of the debts being fill'd up with new and different Ink, the Lords would not allow theſe Debts, except the Defender would offer to prove, that theſe Debts were fill'd up before the perſuer did Diligence as a Creditor, after which time there being *jus quæſitum* to him by his diligence, as no Diſpoſition could have been made to his prejudice, ſo neither could he be prejudged by filling up other Creditors names, than theſe contained in the firſt Diſpoſition; for elſe it were eaſie to cheat all Creditors by ſuch Blanks. And yet here it was offered to be proven, that it was communed expreſly, at the time of the granting of the Diſpoſition, that theſe Debts ſhould be payed which was alledged to be ſufficient, being proponed in fortification of the Diſpoſition, which was prior to the Creditors diligence, 15. *January*, 1670. Lady *Lucie Hamilton*, againſt the Laird of *Dunlop*, and others.

Theſe Remarks may reconcile the contrair Deciſions that are to be found upon this Head, ſuch as the 22 *January*, 1630. *Pringle* contra Mr. *Mark Ker*. Wherein, the Lords found that the Purſuer ought to prove, that the Bond was made without any juſt or neceſſary Cauſe, either by Write, or by the Oath of the Party Receiver of the Bond, & found no neceſſity to burden the Receiver of the Bond, to prove an onerous Cauſe thereof, any other way, than by the Bond it ſelf, becauſe as is there obſerved, when Parties borrow Money or contract mutually, there is no other way to prove the borrowing or contracting, but by the Writ then made; and found expreſly, that this was not a Negative which proves it ſelf. And yet upon the 12. *February*, 1622. It was found that this part of the Act of Parliament was a Negative, and proved it ſelf,

It ſeems likewiſe, that if the Party who made the Right, was not able to pay the Debt otherwiſe, that then the Probation ſhould be ſo much the ſtricter: And though the Oath of the Receiver ſhould not be taken as a full Probation; yet if the Receiver of the Diſpoſition have in any former purſuit, been forced to depone upon the onerouſneſs of the Cauſe, that Oath ought to purge any preſumption of Fraud; for though that purſuit ſhould not bind any other than the perſons who were Purſuer or Defender there, as what was *inter alios acta, quæ aliis non nocet*, yet the Receiver having been put to ſwear, ought to have this advantage alſo, as he had that trouble. And that Oath being upon the ſame ſubject-matter, it ought to be ſtill much reſpected; eſpecially ſince this Oath is only required to clear the Judge, as to the truth of the Debt, and as to the onerouſneſs of the Cauſe.

Whether a Diſpoſition procured by a Tutor to his Pupil may be quarrelled, as granted in defraud of lawful Creditors, and how the Fraud may be proved, in that caſe it may be doubted, for it may ſeem, that no mans Right can be taken away, without ſome Act of his own, and the Tutors Oath cannot prejudge his Pupil, for a Tutor may make his Pupils condition better, but cannot make it worſe. And yet there may be two diſtinct caſes conſidered

red here, one is, if the Diſpoſition be granted without an onerous Cauſe; and there is no doubt but ſuch Diſpoſitions may be quarrelled, for if the Minor cannot inſtruct an onerous Cauſe, his Diſpoſition is null; and there ſhould be no difference as to this, betwixt Majors and Minors: And in this ſenſe is to be underſtood, *l. 6. §. 10. h. t. Si quid cum pupillo geſtum eſt, in fraudem creditorum, Labeo ait, omnino revocandum eſſe, quia pupilli ignorantia non debet eſſe capitoſa creditoribus, & ipſi lucroſa*, which agrees with *l. 6. §. 6. Baſil. h. t.* though it be the more general ειπερ αυτον πραχθη τι επι πειρατο παραπρεσθαι. The ſecond caſe is, when the Tutor payed a price in the Pupils name, but knew it was gtanted to defraud the Diſponers Creditors, it ſeems that though a Tutor cannot depone upon Rights not acquired by the Tutor himſelf, yet in Rights acquired by himſelf, he may depone, and his Oath acknowledging the fraud ſhould annull the Pupills Right acquired by his Tutor, for *quem ſequitur commodum, eum ſequi debet incommodum*: and that there is no reaſon the poor Creditors ſhould be prejudged by inſerting the Pupils name, but he ought to purſue his Tutor. But yet I incline rather to think, that if any Tutor knowing that ſuch a Debitor was to defraud his Creditors, did lend out my Money to buy Land in my name; that though his being partaker of the fraud might have annulled this Right, if it remained in his own perſon, yet his fraud being meerly perſonal, cannot prejudge me who was innocent, no more, than if my Factor ſhould collude with ſuch a Debitor, would his colluſion prejudge me. And ſo neither of their Oathes can prove againſt me, for their fraud is not relevant againſt me, except in ſo far as I have received advantage by the fraud of my Tutor, or Factor: in which caſe, deeds either done by the Minors ſelf, or by his Tutor, are reduceable at the inſtance of lawful Creditors *l. 10. §. 3. Baſil. h. t.* εαν ανεπιτηδειος εισητος αγορασειν τι περι αυτε φροντ ζοντες εις ετερον εγυητο πλοισιωτερει χλαντονιαι But if Minors ſell any Lands in defraud of their Creditors, then if they ſell without the conſent of their Tutors or Curators, the Alienation will be *ipſo jure* null, and ſo needs not be reduced: But if the Diſpoſition was made with the conſent of Tutors and Curators, though it be reduceable upon minority and *Læſion*, yet the Minors Creditors cannot raiſe a Reduction *ex hoc capite*, for that reaſon is perſonal, *nec egreditur perſonam minoris*; but the Creditor in this caſe muſt compriſe the Right or Action competent to the Minor, & as having Right to the Action in manner foreſaid he may reduce the deeds done by the Minor.

Whether a Defender in theſe Reductions *ex capite fraudis*, may be forced to depone whether he was *particeps fraudis*; may be doubted, and it appears that he cannot, for the being partaker of the fraud, by this Statute diffames all ſuch as are guilty of it. And by our Law, no man is oblidged *jurare, in ſuam turpitudinem*. But yet I find that the Lords have *ex nobili officio*, obliged parties to be examined upon their acceſſion to ſuch contrivances, 7. *Febr.* 1673. Dame *Eliſabeth Burnet* contra Sir *Alexander Fraſer*. And even in Improbations, they examine, *ex officio*, the parties who are alledged to be Authors; though the hazard be greater there, than in theſe Reductions. And ſeing reaſons of circumvention are referred to Oath, why may not the being partaker of the Fraud, be referred to Oath? If the Lords, and His Majeſties Advocat, declare, that the Deponers Oath ſhall not infer, *infamiam juris*, againſt him, which is a criminal puniſhment; without which be ſecured to him, I conceive he is not obliged to depone.

It may ſeem, that the Action of Reduction, founded upon this Act, againſt ſuch as are partakers of the Fraud, ſhould not preſcribe, becauſe this is a cheat which the Law ought not to maintain, nor aſſiſt, and this ſhould no more preſcribe, than *actio falſi* doth; whereof this cheat ſeems but a branch, or which at leaſt, it doth much reſemble. And by the Canon Law

(which as *Craig* obſerves, we prefer to the Civil Law in *Scotland*, where matters of Conſcience are conſidered) he who is *in mala fide*, cannot preſcribe *c. Fin. de preſcript.* And to allow the partaker of the Fraud a ſecurity of preſcription, were to tempt him to cheat. Notwithſtanding of all which, certainly all Actions upon this Act would preſcribe: For neither our Act 28. *Par.* 5. *J.* 3. Which appoints the preſcription of moveable Rights, nor the Act 1617. Which introduced preſcription in Heretable Rights, makes any exception in favours of this Action. And our Law being deſirous to ſecure all perſons in general, has drawn theſe Acts very comprehenſively, *& ſibi imputent*, ſuch as are prejudged, who ſuffered ſo much time to elapſe without diligence. Likeas the Civil Law, which conſidered *malæ fidei poſſeſſores*, with a very unfavorable eye, does allow the benefit of even 30. years preſcription, *malæ fidei poſſeſſori*, for the ſame Reaſon as is clear, *C. de preſcript.* 30. *&* 40. *annor.* And the ſame is obſerved in *France Guid. Pap. queſt.* 199. And though we obſerve the Canon Law, in caſe of Marriage, Teinds and ſuch like, which are ſomewhat Eccleſiaſtical by their ovvn nature; yet in preſcriptions vvhich had their original from the Civil Lavv, vve follow the dictats of that excellent Lavv.

Or the moſt part of the Price thereof was converted, or to be converted, to the Bankrupts profit and uſe.

ANother preſumption of the fraudulent Diſpoſition of the Bankrupts Eſtate, is, if the price of the Debitors Eſtate was converted, or to be converted to the Debitors own uſe, and profit. And this proceeds upon the ſame reaſon, whereby the Rebels Eſcheat is declared null, if he be ſuffered to remain in poſſeſſion, Act 145. *Par.* 12. *Ja.* 6. And as by that Act, the ſuffering the Rebels Wife or Bairns to remain in Poſſeſſion, is equivalent, as if the Rebel himſelf remained in Poſſeſſion; ſo if it can be proven, that the price of the Debitors Land was applyed to the behove of his Wife, and Children; I conceive it is equivalent, as if it were converted to his own behove, though this Act do not expreſly bear it.

Upon this part of this Act, aroſe lately the enſuing debate; *Hermiſtoun* being obliged to pay the Lord *Sinclair* 8000. merks as an Annuity, and for his Aliment: This obligement was aſſigned to *John Watt*, and was by him transferred to *George Cockburn*, who did pay ſeveral Debts for my Lord, but finding that his payment, might thereafter be challenged by my Lords Creditors, as made in prejudice of them who were prior Creditors, he did take the Gift of my Lords Eſcheat, and gave a backbond to the Exchequer, wherein he obliged him to compt at the ſight of the Exchequer, for the ſuperplus that exceeded the payment of the Debt truely payed, or to be payed by him, for my Lord. The Creditors having quarrelled thoſe payments upon this Act 1621. as made to their prejudice, becauſe though it was free to the Exchequer, to gift my Lords Eſcheat, and to burden it with any Backbond, yet this gift was granted truely to *George*, in contemplation of his former Right; which former Right was null, as made to defraud them, and for the uſe of their Debitor; and the Right made to him was null by this clauſe, of this Statute, by which all Rights made to any perſon, are preſumed fraudulent

fraudulent; if the Price be converted to the behove of the Debtor: and if this were allowed, poor Creditors might ſoon be cheated by ſo eaſie contrivances. And though His Majeſty may prefer a Donator to the true Creditor, where that is chiefly deſigned by His Majeſty; yet where the Gift is taken only by a Perſon who had formerly defrauded Creditors, meerly to palliat the Fraud, in that caſe, the Gift *laborat eodem vitio*, being alſo taken for the behove of the Debitors, and ſo is null by the former Act 147. *Parl.* 12. *Ja.* 6. But this was repelled, becauſe the Lords found, that whatever might be ſaid againſt the former Right, upon this Statute, yet the Gift of Eſcheat did ſufficiently defend him, for ſince any Superior might allow an Aliment to his Vaſſal, being Rebel, and might grant his Liferent-Eſcheat for that effect, why ſhould not this Liberty be allowed to the King, 3. *December.* 1674. But if this Gift had not interveened, it ſeems uncontraverted, that the Obliegment to pay *Sinclars* Debts, though undertaken prior to any Action at the Creditors inſtance, was not ſufficient to defend the Undertaker againſt prior Creditors, for the Right being at firſt quarrellable at their inſtance, as done in defraud of them; it being a Right made for the behove of the Debitor: it could not thereafter convaleſce, by undertaking the Debitors Debts. For it was all one to pay the Money to *Sinclars* Creditors, as it would have been to have payed it to himſelf. And if the Money had been payed to my Lord, to the end he might have payed them, the payment might without doubt have been quarrelable. And yet a Deed once quarrelable may thereafter convaleſce, if there was no Fraud in the firſt Contrivance, *v. g.* If an Uncle ſhould diſpone his Eſtate to his Nephew, who knew not of his being inſolvent, this Right might be reduced upon this Statute. And yet if thereafter, the Nephew ſhould *bona fide* undertake the Uncles Debts, before any Diligences done by the Creditors, his Diſpoſition would be ſuſtained in ſo far as true Payment was made.

They making the reſt forth-comming to the remanent Creditors who want their due payment.

SInce by this Act, the Diſpoſition made by a Bankrupt to one who was Partaker of the Fraud, is reduceable; ſo that the Buyer will be forced to quite the Land, or thing bought fraudulently to the Bankrupts true Creditor: It may be doubted, whether the Buyer, though Partaker of the Fraud, will get Repetition of the Price truely payed by him, from the Bankrupt to whom he payed it. And it may be argued, that he would not, becauſe firſt, the Law never authorizes, nor lends its Aſſiſtance, to recover what is due by fraudulent, and unworthy Obligations, for there it behoved to be the Miniſter of Iniquity, and to ſerve Vice in a mean, and ſordid way, *& ubi dantis, & accipientis turpitudo verſatur, ceſſat repetitio. l. 3. ff. de condict. ob. turp. cauſ.*

2. The Buyer in this caſe cannot complain of the Law, ſince he knew the hazard, and yet run upon it. 3. This were to invite men to commit Cheats; whereas to deny them Action of Repetition upon the Eviction, were a ready Mean to deter them, ſince the hazard would be ſo great. 4. This may be further clear. *l.* 1 *C. de preſcr.* 30. *annor. & l. hi qui C. de reſcind. vend. & l*

fin.

fin. C. de litig. & l. ſi fundum ſciens. C. de evict. & l. 25. *Baſil. de reb. auth. jud. poſſidend.* φησι ο αφεισος. ει συναλλαξω σοι ειδως οτι περιγραψαι θελεις τους δανειςας σου, ουκ εχω κατα των πραγματων σου απαιτησιν. But yet the contrair, *viz.* That the fraudulent Buyer ought to have Repetition from the Bankrupt Seller; may be urged by theſe Reaſons, Firſt, Crimes and Frauds are extinguiſhed by mutual Compenſation, and therefore, ſince as the Buyer would have had an Action of Eviction, if no Fraud had interveened, ſo ought he to have the ſame Action where the Fraud is mutual, for there it is in the ſame Condition, as if it had never been; for it is extinguiſhed *l. vigo. ff. ſolut. matr.* 2. If the Seller ſhould not be obliged to reſtore the Price, he ſhould gain by his own Cheat, for his Creditors would be payed, by prevailing againſt the Buyer, and he would retain the Price. 3. Where the Buyer and Seller are in the ſame Condition, his condition is moſt favoured by the Law, who ſeeks only to ſecure himſelf againſt loſs; *in pari caſu melior eſt conditio ejus qui certat de damno vitando, l. non debet ff. de reg. jur.* And this is alſo clear, *per l.* 3. *C. de his qui vi metuſve cauſ. & l. fin. C. Commun. delegat.* I would rather perhaps incline to think, that becauſe both have offended, therefore both ſhould be puniſhed; the one by being obliged to refound the Price received, and the other by not getting it, though refounded: But that he ſhould ſee it confiſcated by publick Authority, like the Legacies left to unworthy Perſons, who are uncapable of them; for theſe remain not with the Teſtator, nor yet go to the Legator, but *fiunt caduca*, and belong to the Fisk.

It may be here doubted, if in theſe Reductions, the Defender who is to reſtore what is diſponed to him, will be obliged to reſtore the fruits of the thing ſold, and whether he will be obliged to reſtore them from the date of the ſentence, or from the time of Litiſconteſtation or from the Citation. The Civil Law *l.* 25. §. 4. *F. h. t.* ordains not only the thing it ſelf to be reſtored, but the fruits which were upon the ground at the time of the Alienation, and theſe which were reaped after the Action was intented, *non ſolum autem rem ipſam reſtitui oportet, verum & fructus qui alienationis tempore terræ cohærent, quia ſunt in bonis fraudatoris. Item eos qui poſt judicium inchoatum recepti ſunt medio autem tempore perceptos in reſtitutionem non venire.* But the *Baſilicks* differ ſomewhat, for they ſay, *qui poſt litem conteſtatam percepti ſunt.* As *Fabrot* tranſlates them, μετα προκατα-ξωλησθεντες. But theſe may be reconciled, becauſe though in our Law, Litiſconteſtation is only made by the Deciſion of the points *in jure*, and the aſſigning a day to either party to prove, whereupon an Act is extracted: yet by the Civil Law, Litisconteſtation was made as ſoon as the Defender denyed the thing craved, and ſo *judicium inchoatum* differed a little with them, from Litiſconteſtation.

Our Senate obſerve as a general rule in all Reductions, to decern fruits to be reſtored from the time that the Poſſeſſor knew that his Right was not valid: and therefore when it was palpably unjuſt, they uſe to decern from the date of the citation, but not from the Citation upon the firſt Summonds, becauſe theſe are but indorſations, where copies are ſeldom truly given, and ſo the defender could not thereby be put in *mala fide*. This was ſo decided, *Howiſon* contra *Gray*, *February* 1672 And yet this ſeems to Authorize the belief that citations upon firſt Summonds may be falſe, whereas ſince the Law commands them, it ought to believe them, and ſo puniſh the Forgers, rather than diſcredit the form. If the nullity depend upon a debateable point, they decern from the Litiſconteſtation, becauſe that nullity was not clear till then, *v. g.* if a diſpoſition were quarrelled as made to a Brother in Law, and he alledged that the Act extends not to Brothers in Law, if the Lords found the Statute to extend to Brothers in Law, *eo caſu*, if it were referred to the Defender

fenders Oath; the Lords uſe to decern from the Litiſconteſtation; becauſe after that, the *D*efender could not doubt of the Nullity of his own Right, tho' before he might have doubted. But if the nullity depend upon extrinſick probation, which the *D*efender could not know before ſentence: as for inſtance, if it ſhould be denyed by Act of Litiſconteſtation, that the *D*ebitor became, and was inſolvent; the *D*efender could not be in *mala fide* till this were found proven, and ſo ought not to be lyable in *fructus*, till ſentence.

I conceive that theſe generals may be likewiſe particularly applyed to this Statute, by conſidering three different caſes, relative to the three different parts of this Statute.

The firſt is, that of the firſt part of the Act, by which all diſppſitions made to confident, or conjunct perſons, in defraud of lawful Creditors, without an onerous Cauſe, are ſo reduceable, that the Alienation being reduced, the fruits extant are to be reſtored from the time of the intention of the Cauſe, and not only from the time of Litiſconteſtation. And yet it would appear, that all the bygone profits, or fruits, ought to be reſtored; not only from the time of the *C*itation, but from the date of his poſſeſſion: Becauſe, 1. By the expreſſe words of the Statute, all ſuch Alienations are declared to have been null from the beginning, and ſo are in the ſame caſe, as if they had never been made. But ſo it is, if they had never been made, the Poſſeſſor behoved to have reſtored all the fruits, whether extant, or not, and even from the time of his poſſeſſion. 2. This ſeems moſt reaſonable, for the Law having diſcharged ſuch Alienations, he who *C*ontracts in ſpight of, or to cheat the Law, ought not to be protected by it; and the *D*ebitor might thus prejudge his Creditors, for it is a prejudice to them to want the fruits and profits of their *D*ebitors Eſtate, from the Alienation, till the time of intenting an Action, which poverty, or abſence, ignorance, or latency of the deed, may keep them from intenting; and which may be very conſiderable; and were it not abſurd, that a gratuitous *D*iſpoſition of an Eſtate, of ten thouſand Merks by year, ſhould carry the receiver to five or ſix years Rent, extending to 50000. Merks, becauſe theſe Rents were intrometted with prior, to the intenting of any Action of Reduction, and yet the Eſtate ſhould not be able to pay all the Debts due to the many poor Creditors, who are Purſuers of the Reduction.

The ſecond caſe is, where the Diſpoſition was made to one who was *Particeps fraudis*, and he is to reſtore even all the profits from the date of the alienation, whether they be fruits occaſioned by his own induſtry, or brought forth by the nature of the thing poſſeſt. For he who was partaker of the Fraud, is *malæ fidei* Poſſeſſor, and ſuch are ſtill decerned to reſtore all, *fructus extantes rei vindicatione; & conſumptos condictione ſine cauſa, l. 3. C, de condict. ex leg.* nor ought he in reaſon to reap advantage by his own cheat: and as he cannot blame the Law for ſeverity to him, ſince he occaſioned his own loſſe; ſo the Creditor might complain that ſuch as cheated the Law, and him, were enriched by his loſs. And the reaſon why *bonæ fidei poſſeſſor facit fructus conſumptos ſuos*, is, becauſe he not knowing but theſe profits were his own, thought he might live accordingly; this reaſon is wanting in him who is partaker of the Fraud, for he knew that theſe profits belonged to others, and ſo ſhould not have ſpent them. And though it may be alledged, that all Diſpoſitions made to confident, or conjunct Perſons, are reduceable by this Act, as fraudulent, and therefore the receiver cannot be called *bonæ fidei Poſſeſſor* in no caſe, for nothing is ſo contrary to *bona fides*, as *Fraus*. It is anſwered, that a Diſpoſition may be made to a conjunct perſon, who knew neither that the Diſponer had Creditors, or that his Eſtate was not able to pay them, and *Fraus ex eventu*, as I obſerved formerly, is not *Mala fides*.

The third caſe, is of Creditors who got a Diſpoſition from the common Debitor for payment of their Debt, but it is reduceable at the inſtance of other Creditors, who have done diligences; and theſe, I think, ſhould according to the rules of Juſtice, and Reaſon, be only obliged to reſtore the profits of the thing ſo diſponed, from the date of the ſentence: for ſince they are more favourable than a conjunct perſon, who gets a Diſpoſition without an onerous Cauſe, and that he *lucratur fructus ante citationem perceptos*, they ought to have more favour. But I have not heard this debated, nor decided, and it is generally believed that they would be lyable after citation, but if he hath *doloſe* received payment, and was *particeps fraudis*, even he, though a Creditor, ought to reſtore all the profits received by him from the time of his poſſeſſion. In all which Reſtitutions the reſtorer will have detention of the neceſſary expences beſtowed by him, whether he be *bonæ fidei*, or *malæ* Poſſeſſor *l* 5. *Cod. de rei vindicat.* ὑποξαιρουνται μεντοι τα επ αυτοις αναγκαια δαπανηματα *Baſil. l.* 10. §. 14. *h. t.* To which there is alſo added και τα κατα γνωμην των δοντεσων γινομενα *Et ſi quæ aliæ ex creditorum voluntate factæ ſunt.*

The Civil Law ordained the fruits that were upon the ground, the time of the Diſpoſition, to be reſtored, though theſe were conſumed before citation *l.* 25. §. 4. *h. t.* becauſe *fructus pendentes*, were *pars ſoli*, and ſo were to be reſtored: but this has not been craved with us: and ſince they uſe to be *bona fide* ſpent, there is no reaſon to reſtore them more than other fruits. I have heard it contraverted, Whether a Perſon to whom a Diſpoſition is made in defraud of Creditors, may when that Diſpoſition is reduced, purſue by way of Action, for the expenſes he beſtowed neceſſarily in repairing the Lands, or Houſes diſponed; and it may ſeem that this being once a Debt due to him, it cannot be taken away but by a Diſcharge: and yet Lawyers are clear, that though ſuch expenſes may be retained, or that the Defender in ſuch Reductions may alledge that his Right cannot be reduced till all his expenſes be repayed. Yet if he ſuffer his Right to be reduced without proponing upon his expenſes, and meliorations, then he ſeems to have paſt from them. For the Law preſumes, that if he had any thing due to him, he would have craved it before he was diſpoſſeſt: Neither is it only to a Poſſeſſor *malæ fidei* that the Law makes no Action competent *pro ſumptibus in rem alienam factis*, but the ſame is likewiſe aſſerted *de bonæ fidei poſſeſſore. l.* 47. *Baſilic, de rei vind.* ὁ Καλη πιστει περι ων εδαπανησεν αγωγην ουκ εχει, αλλα παρακατασχεσιν. which agrees with *l. ſumptus ff. de rei. vind. & l. ſi in area. ff. de condict. indebit.* But yet it is the opinion of ſome eminent Lawyers with us, that even after the Right is reduced, the perſon to whom the Right is made, may recover payment of what he neceſſarily beſtowed, even by way of Action: and *Molineus ad conſuetud. pariſienſ. t. i. gloſs*, 5. Is of their opinion, and aſſerts that the preſent cuſtomes of all Courts have receded as to this from the Civil Law, and yet it may ſeem in our Law, that this is competent and omitted, and ſo ſhould rather be allowed in our Law, than in the Civil Law, eſpecially ſeing this is of the nature of compenſation. For when the Purſuer craves the thing diſponed to be reſtored, with the fruits and intereſts: it ſeems to be a ſufficient ground of compenſation, or at leaſt an exception *qua ſapit naturam compenſationis*, that the Defender beſtowed as much upon the thing craved to be reduced, as may compenſe the fruits, or a part of the Stock, and by expreſſe Act of Parliament, compenſations are not receiveable after ſentence, and therefore neither ſhould it be lawful after ſentence of Reduction, wherein this allowance might have been craved; to ſeek allowance by way of Action, for what was beſtowed in Meliorations, or neceſſary expenſes.

And

And if in time-coming, any of the ſaids Dyvours, or their interpoſed Partakers of their Fraud, ſhall make any voluntar payment, or Right to any perſon, in defraud of the lawful, and more timely diligence of another Creditor, having ſerved Inhibition, or uſed Horning, Arreſtment, Compryſing, or other lawful Means duely to affect the Dyvours Lands, or Goods, or price thereof to his behove: In that caſe, the ſaid Dyvour, or interpoſed perſon ſhall be holden to make the ſame forthcoming to the Creditor having uſed his firſt lawful Diligence, who ſhall likewiſe be preferred to the Creditor, who being poſterior to him in Diligence, hath obtained payment by particular favour of the Debitor, or of his interpoſed confident, and ſhall have good Action to recover from the ſaid Creditor, that which was voluntarly payed, in defraud of the Purſuers diligence.

ALbeit by the firſt part of the Act, all Diſpoſitions be allowed, if made for onerous Cauſes, to conjunct or confident Perſons, yet that only holds where Creditors have done no lawful Diligence: But where Creditors have done lawful Diligence againſt the Bankrupt, by Inhibition, Arreſtment, Horning, Compryſing, or otherways, in that caſe the Bankrupt againſt whom the Diligence is uſed, cannot make any voluntar Right of

his Eſtate, to prefer thereby any Creditor he pleaſes, to the Creditor who has uſed Diligence, and that though the Creditor who has got the Diſpoſition, was likewiſe a lawful Creditor: But in that caſe the Creditor who is preferred, is declared by the Act to be lyable to make forth-coming the Price of what was diſponed to him.

By the Principles of Reaſon, he ſeems not to Act fraudulently, who gets payment of what is due to him. But yet by the Civil Law, *poſtquam Creditores à magiſtratu in poſſeſſionem bonorum miſſi erant*, their Debitors could not even pay any true Con-creditor, and ſo prefer one Creditor to another, ſuitably to which, our Law has not allowed here the preferring one Creditor to another, after diligence done by Horning, Inhibition, *&c.* Which Diligence we have equalled to the *miſſio in poſſeſſionem* by the *Roman Magiſtrate*; And in effect there can be no Diligence done in *Scotland*, without the Authority of the Magiſtrat; for no Inhibition, Horning, *&c.* can be raiſed without a Warrand from the Magiſtrat. And as it was reaſonable that a Creditor *qui ſibi vigilavit*, by getting payment, ſhould not be prejudged; ſo it was as reaſonable, that payment made to him in prejudice of another Creditor, *qui ſibi vigilavit*, by doing Diligence ſhould not be ſuſtained. And thus we may reconcile this part of the Statute with *l. 6. §. 6. h. t.* which ſays that *qui ſuum recipit nullam videtur fraudem facere*, with which agrees. *l. 6. §. 2. Baſil. h. t.* ὁ χρεως λαβων ου παραγραφει.

From this part of the Act, it is firſt obſervable, that though voluntary Rights are reduceable, at the inſtance of prior Creditors, who have done Diligence; yet neceſſary Rights are not, and therefore, if the Bankrupt was obliged by a Minute to ſell his Land, before he was put to the Horn, if for Implement of that Minut, he ſhould thereafter diſpone his Lands, that Diſpoſition May ſeem not reduceable, at the inſtance of a Creditor who had uſed Diligence, by Horning, or otherwayes after the Minut, though before the Diſpoſition; Becauſe it may be alledged, that in this caſe, the Creditor cannot be ſaid to have been voluntarly preferred by partial favour, as the Act bears. For that cannot be called voluntar, to which the Diſponer might have been compelled. And in this caſe, as well as in Reductions, *ex capite Inhibitionis*, theſe Diſpoſitions which depend upon neceſſary Cauſes, are drawn back, *ad ſuam cauſam*. But the Doubt may be greater, if the Cauſe upon which the Diſpoſition depended, had no ſpecifick Obligation in it, to grant the Deed quarrelled, but only a general Obligation, *v. g.* If *Titius* ſhould only be obliged by a Minut to diſpone Lands to *Mevius*; if *Titius* thereafter being put to the Horn, at the inſtance of *Sempronius*, ſhould after he was put to the Horn diſpone Lands to *Mevius*; it may be doubted whether that Diſpoſition would be reduceable, ſince the Minut did not bear an expreſs Obligation to diſpone the ſpecifick Lands afterwards diſponed, but only to diſpone Lands in general: For it may be alledged, that *quoad* theſe Lands, the Right was voluntar, ſeing there was no ſpecifick Obligation, *quoad* theſe. And if ſuch a Diſpoſition, as this might be ſuſtained, all Diſpoſitions, made for onerous Cauſes, might be ſuſtained,

Notwithſtanding of all which, I conceive, that by voluntar Rights and Payments in this Paragraph, are underſtood all ſuch Rights and Payments, as are made without any previous Diligence, though the Debitor could have been compelled to make them; and though there be a preceeding Cauſe, whereupon the Debitor might have been forced, to make the ſaids Rights and Payments, and ſo are neceſſar, *quoad* the Debitor, if other Creditors had not been concerned; yet they are accounted voluntary, as to this Act and Statute, becauſe the Debitor having other Creditors, who might have compelled him as much as the Creditor whom he has ſatisfied: Yet he voluntarly

luntarly prefers and gratifies him in prejudice of their *D*iligence. And even in the case here instanced, of a Minut bearing an Obligation to dispone Land, if the *D*yvour should after the diligence of other Creditors dispone, that *D*isposition would be construed a voluntary Right, which the Bankrupt ought not to have granted in prejudice of his other Creditors, who had done Diligence, and who might have affected the same Land, if the Disposition had not been made; notwithstanding of the personal Obligation contained in the Minut. And it cannot be denyed, that there is a great difference betwixt a Debitor inhibited only, and a *D*ebitor Bankrupt; for a *D*ebitor who is inhibited, disponing what he was bound to, by an Obligation prior to the Inhibition, does not contraveen the Command of the Inhibition, which only forbids him to do any new *D*eed, to the Prejudice of the Inhibitor. But a Bankrupt not being able to satisfie all his Creditors, does contraveen this Law, in gratifying one, to the prejudice of others, and to the prejudice of *D*iligences done by them. Especially since he could not have been compelled in Law, to prefer the Creditor who had done no *D*iligence.

What diligences are sufficient to reduce Deeds done by *B*ankrupts for preferring one Creditor to another contrary to this Paragraph of the Act of Parliament may be resolved in these Conclusions.

1. The Registrating of a *B*ond was not sufficient, *January* 1688. *Welsh* contra *Gallatie*, because Registration is not a Diligence upon a Bond, but only a Deed done for preservation of the Bond; and the Registration cannot prove the date in a competition for it is known that a *B*ond will be got Registrated of any date, and not of the true date of which it was given in, which is a thing very punishable in it self, for thus it may be registrated and oftimes 'tis after the Death of the Granter, tho' by his Death the Procuratrie expires, which is the warrant of the Registration; But yet I think it may be urged, that Registration should be a sufficient diligence, *quoad* this effect, for else the Debitor from Despite against his Creditor because he raised diligence, or to prefer his nearer Friends and confidents in prejudice of the Diligence, may make and grant Rights so that the Remedy appointed by this Act for preventing this by using Horning or serving Inhibition, *&c* will become absolutely ineffectu- and elusory.

2. Though this Clause bear generally, *that Dispositions made in prejudice of such as have done lawful diligences, by Inhibition, Horning, Arrestment, or Comprising, shal be quarrelable*: Yet it may be justly doubted, whether these words must be so interpret, as that any of these Diligences shall be a sufficient ground, promiscously to quarrel any Disposition: So that the Law considers not so much the nature of the diligence done, as the partial favour, and gratification of the Dyvour, or confident who has done no diligence, and the preferring him to one who has done diligence, though that diligence was not *per se* proper to affect. For if it had affected properly, there had been no necessity for this Act, or Statute, *v. g.* If the Creditor had inhibited, the Debitor could not have thereafter disponed in prejudice of that Inhibition, but the Disposition would have been reduceable *ex capite Inhibitionis*. But if the Creditor not knowing that the common Debitor had Money lying by him, that could be affected with Arrestment, did omit to Arrest, but did inhibite, it appears, that if the Debitor should, to gratifie and prefer a Creditor, who has no diligence, give him that Money, this Law and Statute intended, that the Creditor who has done diligence by Inhibition, should not only have liberty to reduce all Dispositions *ex capite Inhibitionis*: For that was competent before this Law, but that he should have *condictionem ex hac lege*, to recover that Money; though the Inhibition be no proper way to affect it. And yet upon the other hand, it would seem absurd, that the using of an Arrestment

ſhould be a ſufficient ground for the Uſer to quarrel a Right made of Lands, for that were *vitioſa tranſitio, de genere, in genus*. But as in all general Clauſes, ſo in this, the application muſt be, *ſingula ſingulis*: and therefore if after a Creditor has uſed any real diligence that may affect Land, ſuch as Inhibition, or Compriſing, his Bankrupt Debitor, ſhall to diſappoint that diligence, diſpone his Lands toa Con-creditor, who has done no diligence; then the Inhibiter or Appryſer, may quarrel that Diſpoſition; or if a Creditor has affected any of his Debitors ſumms, by Horning, or Arreſtment, and if to diſappoint that diligence, the Bankrupt *D*ebitor ſhould diſpone upon his Moveables in favours of a Con-creditor, *eo caſu*, that *D*iſpoſition to the Moveables might be quarrelled by him who has uſed Horning, or Arreſtment: which are diligences proper to affect Moveables in our Law. Which may be further urged by theſe Reaſons, 1. Becauſe Inhibitions and Compriſings are not proper diligences to affect Moveables, no more than Arreſtment or Horning can affect heretage: and the Law never priviledges a diligence except where the diligence could affect. 2. The Reaſon why the Law priviledges ſuch Creditors as have uſed theſe diligences, is, becauſe the Law preſumes they might have affected the Bankrupts Eſtate by theſe diligences, and becauſe it preſumes that the *D*ebitor diſponed his Eſtate, to diſappoint that diligence. But ſo it is, that neither could Inhibitions affect Moveables, nor can Arreſtments affect Heretage; nor were theſe *D*iſpoſitions made to diſappoint ſuch diligences and therefore, *&c.* 3. When men are to buy Land, they look only the Regiſters for Inhibitions, or Compryſings, but they never conſider whether there be any Arreſtments uſed againſt the Seller.

3. Though thispart of theAct be conceived in favours of Creditors, who have uſed Inhibition, Horning, Arreſtment, Compryſing, or other lawfuldiligence; yet this Clauſe muſt be ſo interpret, that the meer raiſing of an Inhibition orHorning is not ſufficient except the Inhibition or Horning be execute, as was found *Feb.* 1671. in the Caſe betwixt *Tynet*, & *Grahame* of *Creigie*. For the Act of *Parl.* mentions ſerving an Inhibition, and uſing a Horning, & not the raiſing of either. But yet if the Bankrupt to diſappoint his true Creditors, who have raiſed Letters of Inhibition, Horning, or Arreſtment, ſhould collude with his other Creditors who knew the raiſing of theſe Letters, and they by expreſs colluſion, ſhould make and receive ſuch *D*iſpoſitions, I conceive theſe *D*iſpoſitions may be quarrelled upon this part of the Act, though the Letters were only raiſed; for elſe the Act might be abſolutely diſappointed, and immediatly upon the raiſing of the Letters, ſuch Diſpoſitions might be made, and the Creditor who did exact diligence, *& omne quod inſe erat*, ſhould be prejudged by fraudulent conveyances, and by the nimious diligences of his Cheating Debitor. Nor ſhould the fraud of a Creditor, receiving ſuch Diſpoſitions, be of advantage to the Receiver, *nam nemo debet lucrari ex ſuo dolo.*

4. *B*ut it is more difficult to reſolve, whether a meer Charge of Horning, without Denounciation, be a ſufficient diligence to make all deeds after the charge to be quarrellable upon this Act. And it may be alledged, that to charge upon the Horning, is to uſe a *Horning*, which is all that this Act requires. 2. The Charge is properly the diligence, for thereby the Debitor is commanded under certification, that he will be denounced; whereas the denunciation is but the effect of the diligence: and the Debitor is denounced becauſe he did not obey. Which Reaſons incline me to believe, that the charge without denounciation, is a ſufficient diligence in this caſe; And it was ſo found in the caſe of *Alexander Chapeland* contra the Creditors of Baillie *Drummond*, for the ſaid *Alexander* having raiſed a Horning againſt Provoſt *Drummond*

mond of a Diſpoſition made the next day after that Horning, was reduced as made in defraud of his diligence, he having denounced as ſoon as the days of the Charge were expired, and the ſame Diſpoſition was likewiſe reduced at the inſtance of Major *Bateman* though he did not denounce for ſixteen days after the Charge, for though it was alledged that *non fecit omne quod in ſe erat* and that that is only to be reputed to be exact diligence, yet this was repelled, becauſe ſo few days were elapſed after he could have denounced, *nec de minimis curat prætor*, nor did the Major himſelf live in *Edinburgh* whereby he could know there was ſuch a Diſpoſition made: but where there was long and ſupine Negligence for many years after the Charge was given in, not denouncing thereupon; The Lords found not the ſame ſufficient to reduce poſterior Diſpoſitions, for that cannot be called a diligence which is not continued *habili modo & intra tempus habile*, and this would put all Creditors to an unjuſt ſtop, for the doer of the diligence would neither pay himſelf, nor ſuffer others to be payed, and this was found *July* 1687. *Home* and *Lyle* againſt *Dalrymple*, and it holds not only in Horning, but in all other diligences as Compryſings, *&c.* 8. *Febr.* 1681. *Wilſon* contra *Roſs*; and for the ſame reaſon, I believe that a perſonal Charge upon an Inhibition, would operat the ſame effect, though the execution were not uſed at the Mercat Croſs; becauſe that is only neceſſar to put the Liedges in *mala fide*, in order to a Reduction *ex capite inhibitionis*.

And I conceive likewiſe, that the Inhibition being lawfully ſerved, though not regiſtrated, would be ſufficient *quoad* the effect deſigned by this part of the Act, for the Regiſtrating an Inhibition is different from the ſerving of it; and the ſerving of the inhibition in all that this Act requires: And if the Creditor may reduce *ex capite inhibitionis*, before it be Regiſtrat, if it be once ſerved, that is to ſay, lawfully execute, much more ſhould the execution of it, without Regiſtration, be ſufficient as to this Act. But it has been found that an Inhibition ſerved at the Mercat Croſs of the Shire within which the Lands did not ly, was not a ſufficient Diligence upon which a Reduction might be raiſed as to Lands in other Shires by vertue of this Clauſe, for *quod nullum eſt pro infecto habetur*; *& quod contra Regulas juris ſit, effectum juris non parit* 1686. *Nicolſon* contra *Currie*.

It may be likewiſe obſerved, that though this part of the Act, muſt be ſo interpreted, as that proper and peculiar diligences may only affect; that is to ſay, Arreſtment, Moveables, and Compryſing Heritage: yet even in that caſe Horning may be accounted a ſufficient Diligence, after the uſing whereof, the Debitor being a Dyvour, can neither Diſpone Heritage, nor Moveables, to the prejudice of the Creditor, who uſed the Horning: is not only a diligence that may affect Moveables, but it is likewiſe a ſtep in diligence, neceſſary for a Horning, previous in many caſes to Compryſings, which are real diligences.

By theſe words *any other mean* is to be underſtood other Lawful diligences, beſide Inhibitions, Hornings, Arreſtments, Compriſings, here expreſt. As for inſtance, if a Creditor ſhould raiſe a Precept of Poynding, and ſhould charge his Debitor thereupon, to diſappoint which, the Debitor ſhould diſpone his Moveables to another Creditor, the raiſer of the Precept might quarrel that Diſpoſition upon this Clauſe of the Act.

It is obſervable, that though in the firſt part of the Act, after the Law has declared all deeds done by Bankrupts, in prejudice of their Creditors, without an onerous Cauſe, to be null; yet it ſubjoyns immediatly in another Clauſe, that if a third party ſhal *bona fide* acquire a Right to theſe fraudulent Rights, theſe Rights ſhall not be quarrellable in their perſon, except they were likewiſe partakers of the fraud. But here where the Law, in this Clauſe, declares, that where diligence is done by a Creditor, the Debitor cannot thereafter

in his prejudice, prefer another who is a Con-creditor, and diſpone the Land to him, though even for an onerous Cauſe. Yet the Law has not determined, whether this Diſpoſition made to a Con-creditor, ſhall be quarrelable in the Perſon of one, who *bona fide* has acquired that Diſpoſition from the Concreditor, in the ſame manner as it would have been quarrellable in the Perſon of the Con-creditor himſelf. And though it may be alledged, that the Clauſe ſubjoyned to the firſt part of the Act, in favours of third parties, ought to be repeated here, for ſingular Succeſſors in this caſe, not being partakers of the Fraud, ought not to be prejudged: Yet if we conſider the caſe ſomewhat inwardly, we will find that a Diſpoſition made by the Bankrupt to a Con-creditor, and by the Concreditor to a third party, is quarrellable in the third Parties Perſon. For the Con-creditor could make no better Right than he had himſelf; and there being *jus quæſitum* to the Creditor by the diligence, ſo that he might have quarrelled the Right made to one of the Con-creditors, by the common Debitor. This Right could not be evacuated by any Diſpoſition, that the Con-creditor could make, and if it were otherwiſe, the Creditors diligence might be eaſily eluded, and diſappointed: for the Con-creditor finding that the Right made to him was qnarrelable, he might ſtill transfer his Right to a third party, and there was great Reaſon why the Clauſe was conceived in favours of third parties in the firſt part of the Act which annulls only Deeds, becauſe made fraudulently; and therefore this Nullity ought not to have been extended againſt third Parties, who were not *participes fraudis*, for there *deficiebat ratio legis*: But this Clauſe of the Act annulls not theſe Deeds upon any perſonal Account, but becauſe theſe Deeds are contrary to Diligences done by a lawful Creditor. And therefore the Nullity here ought to be extended *quoad* all, becauſe to whom ſoever ſuch Diſpoſitions were transferred, they remain ſtill to be Deeds done in prejudice of Diligences done by a lawful Creditor. And ſo the ground of the Nullity here being real, it ought to be extended to all. But if after the Right is ſetled in the Perſon of the Confident, Diligence be done againſt the Dyvour, which the Purchaſer from the Confident, neither doth, nor is obliged to know: he is in *bona fide* to acquire, and his Right cannot be queſtioned upon pretence of Diligences, as being real, *& quæ afficiunt fundum*, in reſpect the Diligence is not againſt the Perſon, who ſtands in the Right, but againſt the Author who was denuded.

Though the former Concluſion holds in Diſpoſitions of Lands, yet it may be doubted, whether it ſhould likewiſe hold in Moveables, and it ſeems very prejudicial to, and deſtructive of all Commerce, that a third Party buying *bona fide* Moveables, ſhould be quarrelled for them: becauſe though they paſt through many Hands, and were bought (it may be) in a publick Mercat; yet they were originally diſponed by a Bankrupt, to a Con-creditor, in prejudice of another Creditors lawful Diligence; and if this were allowed, no Perſon could be in *bona fide*, or in *tuto*, to Buy or to Trade.

Upon this part of the Statute, may be raiſed this other Doubt, *viz.* a Creditor compriſes, and thereafter another Creditor gets a Diſpoſition for payment of his Debt, and is Infeft. And laſt of all a Third Creditor compryſes and is infeft. The firſt Creditor who had compryſed, intents Reduction of the Diſpoſition made to the ſecond Creditor, as made after he had done diligence: In which Reduction the ſecond Compryſer compears, and deſires to be preferred, becauſe he is Infeft before the Purſuer, though the firſt Compryſer: and ſo would be preferred to him. And ſince *qui vincit vincentem me, vincit & me*; it follows clearly, that ſince the ſecond Compryſer would be preferred to the firſt, that therefore he ought alſo to be preferred to the Creditor, who had got the Diſpoſition, becauſe the firſt Compryſer would be preferred

ferred to him who had got that *Diſpoſition*. It is anſwered, for the *Purſuer* who is the firſt Compryſer, that he muſt be preferred, and the *Diſpoſition* made to the ſecond Creditor muſt accreſs to him, becauſe he had done diligence before his *Diſpoſition*; and by this Statute, a Creditor to whom a *Diſpoſition* is made in defraud of a true Creditors diligence, is obliged to make his Right forth-coming to the Creditor who has done *Diligence*; whereas that *Diſpoſition* would be preferred to the ſecond *Compryſing*, though Infeftment had followed upon that *Compryſing*; becauſe no diligence was done by that Compryſer, when the *Diſpoſition* was made, nor could the ſecond Compryſer be preferred; becauſe he Compriſed only all Right that was in the Perſon of the *Debitor*: But ſo it is, that the *Debitor* was denuded, by the *Diſpoſition* made to the Creditor or Truſtee. And I think the firſt Compryſer would be preferred; for this part of the Statute, ordains not the *Diſpoſition* to be null, and not to prejudge the Creditors doing *Diligence*, which if it had only done, the ſecond Compryſer would have been preferred; but it Ordains the *Right* made to the other *Creditor*, in prejudice of the diligence, to be forthcoming to them who did *Diligence*, as ſaid is. It is here alſo obſervable, that if the Creditor who got the *Diſpoſition*, had not been infeft, the ſecond Compryſer had certainly been preferred, for he had the firſt Real Right: Nor had the *Debitor* been denuded by the *Diſpoſition*.

As to the Argument, *qui vincit vincentem me, vincit me* It may be anſwered, that this Brocard receives many Reſtrictions; amongſt which one is, that if he *qui vincit me*, uſe a priviledged way for prevailing againſt me, which is not competent againſt another, then *poteſt quis vincere vincentem me, & tamen non vincere me*. And in this caſe we know, that there is a ſpecial priviledge given by this Statute, to the Creditor who does diligence: and by vertue of this priviledge, the firſt Compryſer prevails here. And this leads me to another Doubt in our Law, which is very conſiderable.

There are three Creditors, whereof one has raiſed, and ſerved an Inhibition: The ſecond compryſes for Debts, and upon Bonds poſterior to the Inhibition, and is infeft. The Third compryſes alſo for Debts prior to the Inhibition, and is alſo Infeft. The Inhibiter intents a Reduction, *ex capite inhibitionis*, againſt the firſt Compryſer, and reduces his Right; and thereafter the Inhibiter compryſes alſo, and being infeft, he competes for the Mails and Duties with the ſecond Compryſer, and craves to be preferred to him, becauſe he has prevailed againſt the firſt Compryſer who would have been preferred to him, he being but a ſecond Compryſer, *& qui vincit vincentem*, &c. 2. The ſecond Compryſer compryſed from a Perſon who was denuded, in ſwa far as the firſt Compryſer denuded the Debitor by his compryſing, whereupon Infeftment followed. But on the other hand, it may be urged for the ſecond Compryſer, that the Inhibiter prevailed only againſt the firſt Compryſer by vertue of his Inhibition, which did ſweep away the poſterior Debts, whereupon that firſt Compryſing was founded. But as to his Debts, whereupon he led the ſecond Compryſing, they were Debts contracted prior to the Inhibition, and ſo were not lyable to a Reduction *ex eo capite*. And as his Debts could not be quarrelled by this Compryſer, ſo his real Right was alſo preferable to his, he having a prior Compryſing, whereupon Infeftment followed.

As no Bankrupt can prejudge his Creditors, who have done diligence, by preferring one of them to another: So neither can he make a *Diſpoſition* to any confident Perſon, with Power to him to pay the *Debt* due to himſelf in the firſt place, and his Creditors in the next place, two inſtances whereof I remember lately decided. The firſt was, the 8 of *January* 1669. the caſe whereof was this; The Laird of *Craigmiller* being Debitor to Mr. *John*

Preſtoun his Brother, did diſpone his Eſtate to him for payment of his Debts particularly therein related; with power to the ſaid Mr. *John* to pay any of the Creditors he pleaſed. And Mr. *John* being infeft upon that Diſpoſition, there was a Competition for the Mails and Duties, betwixt Mr. *John*, and Captain *Newman*, who was one of the Creditors contained in the Diſpoſition: In which Competition, Captain *Newman* craved to be preferred, notwithſtanding of that Diſpoſition granted to Mr. *John*, becauſe the Diſpoſition granted to Mr. *John*, was granted to the behove of the ſaid Captain, his Debt being one of the onerous Cauſes therein expreſt. To which Mr *John* anſwered, that he had power by the ſame Diſpoſition to prefer any of the Creditors he pleaſed, and that the value of the Land was now exhauſted by payment made to other Creditors: To which it was duplyed by *Newman*, that this Diſpoſition was fraudulent, and reduceable upon the Act of Parliament 1621. for as *Craigmiller* himſelf could not prefer any to the prejudice of him who had done diligence, ſo neither could he beſtow that Faculty upon any other. To which it was anſwered, that *Craigmiller* might have diſponed his Eſtate to any perſon he pleaſed, for an onerous Cauſe, before Captain *Newman* did diligence. But ſo it is, that at the time of this Diſpoſition, *Newman* had done no diligence. 2. This Diſpoſition at leaſt ought to be ſuſtained, in ſo far as *Craigmiller* was Debitor to Mr. *John*, either for Debt due to himſelf, or for relief of Cautionry. To which Anſwers, it was replyed, that *quoad* the firſt, it was not relevant, becauſe though the Diſpoſition was prior to the diligence done by *Newman*: Yet the ſaid *Newman* had done Diligence, before payment made to any others of the Creditors; and conſequently before the preference. Whereas by the foreſaid Act, no Creditor could be preferred after diligence. And to the ſecond Branch of the Anſwer, it was Replyed, that though *Craigmiller* could have diſponed his Eſtate to Mr. *John*, for his payment, or Relief, expreſly before *Newmans* diligence; yet that was not done in this caſe: For this Diſpoſition was only made in general terms, for payment of *Craigmillers* Debts generally, and Mr. *John* had no advantage over others thereby, but in ſwa far as he had by preferring himſelf by vertue of the foreſaid Clauſe, which was unwarrantable. And ſo the Diſponers Deed *quoad* him, was null; Becauſe *quod facere potuit non fecit, & quod fecit, facere non potuit.* Upon which debate the Lords preferred Mr. *John* only in ſo far as concerned his own Debt, or Cautionry: but ſuſtained not the preferrence, in ſo far as concerned other Creditors.

The other Deciſion was the 24. *July.* 1669. in which *Young* craved a Diſpoſition made to *Anderſon*, by *Fleming*, to be reduced, as done in his prejudice, he being a Creditor who had inhibit, and compryſed. It was anſwered by *Anderſon*, that he had granted a Back-bond, declaring that the Diſpoſition was in Truſt, for payment of the debt due to *Anderſon* himſelf. And in the next place, for payment of *Flemings* Creditors: and ſubſumed, that he had payed as many Creditors as would exhauſt the Price, which he was in *bona fide* to do, there being no diligence againſt him; nor could he be prejudged by any diligence againſt *Fleming*, *Fleming* being denuded as ſaid is.

To which anſwer it was replyed, that *Anderſon* being but a *Truſtee*, was *fictione juris*, in the ſame condition with *Fleming*; And as *Fleming* could not diſappoint him, as a lawful Creditor; for neither could *Anderſon* his Truſtee: And if it were otherwiſe, the diligences of lawful Creditors might be rendered eluſory, for the Debitor who reſolved to diſappoint the diligences of his Creditors, might ſtill diſpone his Eſtate to a Truſtee: which Truſtee, and Truſt, the Debitors not knowing, they could not know againſt whom *Diligence* was to be done. Likeas, in Law, this power to prefer Creditors, behoved to be interpret *legitimo modo & in terminis habilibus*:

ſo

ſo that the Creditors could not be diſappointed, but that they ſhould be preferred according to their diligences, as they behoved to have been by the Debitor himſelf. In reſpect of which reply; the Lords preferred the Creditors; and found that voluntary payment made by the Truſtee, could not prejudge the Creditors who had done lawfull diligences. But the queſtion here remains; whether if any of the Creditors had Arreſted in *Anderſons* hand, as Truſtee, and had purſued an Action to make forth-comming againſt him: If in that caſe, *Anderſon* was oblieged to give in a qualified Oath, bearing that he was Truſtee, but that there was other Creditors who had done more timeous Diligence; or if he ought to have called the Creditors, who had done more timeous diligence, as ſaid is.

This Act is only conceived in favours of ſuch as were Creditors, to theſe who granted ſuch Diſpoſitious, prior to the deeds contraverted. But *argumento hujus legis*, and upon the ſame reaſon of equity, the Lords conſtantly ſuſtain Declarators at the inſtance of Creditors of the Father concluding any Right, made even by ſtrangers, to Children *in familia*, to be null, as being granted to their prejudice, without an onerous Cauſe, or as being acquired by the Parents means. Which preſumptions are never otherwiſe elyded, than by alledging, that the procurer had an Eſtate *aliunde*, whereby he might have procured the Right contraverted. As for inſtance, *Sempronius* being Debitor to *Mevius*, diſpones not his Eſtate to his Son, but acquires an Eſtate in his Sons name from a ſtranger, this Diſpoſition ſo acquired, can never be quarrelled by *Mevius*, the Fathers Creditor, by way of Reduction. For the effect of a Reduction is nothing elſe but the annulling of the deed, and the taking it out of the way, or the bringing back of the Eſtate diſponed, to the ſame condition it was in before; which would not be ſufficient in this caſe becauſe the Eſtate which the Creditor deſires to affect, was never in the Debitors perſon. And therefore it is neceſſary for the Creditor to raiſe a Declarator, wherein he muſt narrate, that *Sempronius* being Debitor to him, did fraudulently acquire the Right of ſuch and ſuch Lands, in his Sons name; and which muſt be preſumed to be acquired by the Fathers Eſtate: becauſe they were acquired by a Son *in familia* who is preſumed to have no Eſtate, but what he derives from his Father, or elſe he muſt Lybel, that though the Diſpoſition be procured by a Major, who is *foris familiat*, and Trafficking upon his own accompt, the ſame was truly acquired by the Debitors means, and the Diſpoſition only acquired to be a colourable Title to diſappoint his Debt. Therefore concludes, that the ſaid Eſtate ſo bought, may be declared lyable to his Debt, in the ſame manner, as if the Diſpoſition had been taken in his Debitors name.

The Common Law, and ours, does not only reprobate Diſpoſitions, made by Debitors: *in meditatione fugæ*, but both the one, and the other of theſe Laws, do likewiſe allow the ſummar apprehending of Creditors, who are ſuſpected to be Bankrupts. And by our Law, though a Man cannot be regulary Impriſoned for Debt, without Letters of Caption be formerly raiſed; Yet in *Maſons* caſe, the 5. *November* 1665. The Lords ſummarly, upon a Bill, iſſued out a warrand to apprehend him, *tanquam debitorem ſuſpectum, & fugitivum*. And though at firſt they doubted, whether their own power could extend thus far, yet thereafter they found that it might: ſince even the Admiral grants ſuch warrants, and yet there may be ſome ſpeciality *quoad* the Admiral ſince the nature of his Juriſdiction allowes a very ſummary procedure, and ſince this his Juriſdiction is ordinarly exerciſed over Perſons, who have an eaſie way to convey themſelves out of the Countrey, and are ordinarly very little fixed to one place.

But becauſe this may open a door to great Arbitrarineſs, and may afford great occaſion of prejudging the Leidges, ſince upon this pretext, Merchants may, whilſt they are going about great Bargains, and others about urgent and neceſſary affairs, be laid up in Priſon upon this accompt. It will be fit to conſider, what the common Law, and Lawyers have delivered as their opinion in this Point.

Lawyers diſtinguiſh *inter fugitivum*; *& ſuſpectum de fuga*, the one is guilty only of an Intention, but the other has actually fled. And I conceive, that *meditatio fugæ*, ſo much conſidered by our Law, is a midſt betwixt thoſe two, for he who is *in meditatione fugæ* has *cum ſuſpecto* deſigned a flight, and has *cum fugitivo*, done ſome extrinſick deed in order to his flight.

He who is ſuſpect, or fugitive, may be apprehended by the common Law ſummarly by any Judge, who can cite that perſon before him, *qui poteſt recitare, id eſt, perſonali coercitione coercere, Debitores*, they may be alſo apprehended by a Judge otherwiſe incompetent: and he that is taken by an incompetent Judge, cannot object the incompetency. For as Lawyers obſerve theſe Debitors who are Fugitive, or ſuſpect of flying, may be apprehended by warrands, direct either by incompetent Judges, or by warrands in direct incompetent times, ſuch as are vacand times, or holy dayes. *glos in l. ult. C. de feriis. verb. fidei juſſionis.* But with us, no Inferiour, much leſs incompetent Judges; can give ſuch warrands. And it has been expreſly decided, that an Arreſtment laid on, even upon a Bankrupts Goods, by an incompetent Judge, was not valid, 5. *December* 1671. where the Arreſtment was laid on in *Paſley*, by vertue of a Decreet obtained before the Baillie of *Cunninghame*, and ſo was found null, as *extra diſtrictum*. Albeit the Bailie of *Cunninghame*, was alſo Sheriff of *Renfrew*, within which Sheriffdom *Paſley* lyes ——— Lawyers are likewiſe of opinion, that the Creditor may apprehend one who is Debitor, if he find him actually fleeing: for fleeing in this caſe, is a kind of Crime. But if the flyer be not a Debitor by expreſs Contract, he cannot be apprehended by the Creditor without a warrand, except either a Judge cannot be had, or that he be fleeing with the Debitors Money, *Ang. in l. extat. ff. quod met. cauſ.*

He who craves a Warrand, to take a Debitor who is ſuſpect, or fugitive, muſt lybel to the Judge, reaſons why he ſuſpects his fleeing, as that he was packing up his Goods, or was lurking, or denyed himſelf when his Creditors were ſeeking him. And though by opinion of the Doctors, none who has an immoveable, or Land Eſtate, can be thus proceeded againſt, becauſe it is preſumed, he will have ſo great care for his Eſtate, as not to leave it: and becauſe his Land Eſtate is always an abiding Cautioner: yet if either the Land Eſtate be very ſmall, or if it be affected with Diligences that may exhauſt it. I think that in theſe caſes, ſuch Heretors can have no priviledge, nor are theſe ſummary Warrands ever allowed to ſuch as become voluntary Creditors, after the Debitor was ſuſpected; for theſe ought to blame themſelves, who truſted a perſon in that condition: But it is otherwiſe if they became Creditors, *ex delicto vel quaſi delicto*: as for inſtance, if after he was ſuſpected, he Rob or Wound, or commit any Ryot. For in that caſe he who becomes ſo, his Creditor may have ſuch a Warrand for apprehending him; and theſe Warrands are granted, not only for pure and liquid Debts: But even for conditional Debts, and for Debts whereof the terms of payment are not yet come; and though the Debts be ſmall, except they be very inconſiderable, *Cacia-lup. tract. de debit. ſuſp. queſt.* 3.

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Finally, the Lords declares, all ſuch Bankrupts, and Dyvours, and all interpoſed Perſons, for covering, or executing their Frauds; and all others, who ſhall give Council, and wilful Aſſiſtance unto the ſaid Bankrupts, in the deviſing & practiſing of their ſaids Frauds, & godleſs Deceits, to the prejudice of their true Creditors, ſhall be reputed, and holden diſhoneſt, falſe, and infamous perſons, incapable of all Honours, Dignities, Benefices, and Offices; or to paſs upon Inqueſts, or Aſſizes or to bear Witnes in Judgement, or out-with in any time coming.

FOr the better underſtanding of this part of the Act, concerning the puniſhment of Bankrupts, and of ſuch as adviſe, or aſſiſt them. It is fit to obſerve with the *Civilians*, that Bankrupts, and Dyvours, are either ſuch as are become *inſolvendo* by their Misfortune, rather than fault. And *quoad* theſe, becauſe they were guilty of no Crime, therefore no Corporal Puniſhment was appointed for them by the Law; *omni corporali cruciatu remoto* ſaith *l. fin. Cod. qui. bon. ced. poſſ.* Nor does Infamy follow them, *Ibid. & l.* 11. *Cod. ex quib. cauſ. infam.* And therefore this clauſe of the Act, cannot be interpret of ſuch Bankrupts: and though the clauſe be general, without diſtinguiſhing Bankrupts: and that it might be therefore alledged, that *ubi lex non diſtinguit, nec nos.* Yet general Laws muſt receive their reſtrictive interpretations from the common Law. And ſince the deſign of this Act, was (as is very clear by the Narrative) to prevent, and puniſh Frauds and Cheats; it is juſt, that theſe general clauſes ſhould not be extended beyond the expreſs Scope, and deſign of the Act.

The ſecond kind of Bankrupts mentioned in the Law, are theſe; who only by their own fault become Bankrupts: *qui ſuo vitio fortunas conturbarunt.* And the Third Kind of Bankrupts, were ſuch, as became Bankrupts, partly by their own, and partly by the fault of Fortune, And both theſe laſt kinds of Bankrupts were denyed the benefit of a *ceſſio bonorum, nam hoc eſt miſerorum ſubſidium, ſed non præſidium doloſorum l. fin. h. t. & l. pen. ff. jur. Dot.* And with us, the Bankrupts of both theſe Claſſes are denyed the bene-

fit of a *ceſſio bonorum*, except they wear the Habit: though ſuch are ſpared from it; whom Fortune without their own Fault, has thrown into the neceſſity of ſeeking that miſerable Remedy. Nor does the granting of Diſpoſitions that are reduceable upon this Act ſtill infer Infamy, for if a man grant a Diſpoſition, whereby one Creditor is preferred to another who has done diligence, that Diſpoſition would be reduceable, and yet if there remained as much as might have payed all the Creditors, that Diſpoſition could not infer Infamy. And by this Act, ſuch only are declared infamous, as are guilty of Fraud, and Godleſs Devices.

Such as give Counſel are lyable to the pains of this Act, which is likewiſe conform to the opinion of the *Civilians*, *Vid. Strach. de decoctor*: But they diſtinguiſh betwixt ſuch as gave counſel, or Advice to thoſe who were reſolved before to cheat their Creditors; and ſome Doctors do conclude, that ſuch Advilers are not puniſhable, becauſe the Baukrupt followed not here the Advice of another, but his own inclination. And this Opinion was firſt founded upon the *Gloſſ. inſt. de oblig. quæ ex delict. §. ope.* but others do more reaſonably conclude, with *Dynus ad reg. nullus de reg. jur. l.* 166. That the Advice is equally puniſhable, whether the Bankrupt was reſolved to follow that Advice, or his own inclination: Becauſe the Adviſer did here all that in him was, to tranſgreſs the Law, others diſtinguiſh thus, either (ſay they) the principal Offender deſigned only to have cheated a Bankrupt, but delayed till he got Advice, and then the Adviſer is equally puniſhable with the Principal, becauſe there, the Tranſgreſſion was imputeable chiefly to the Adviſer: Or elſe the principal Adviſer had begun to defraud and cheat his Creditors; and the Advice did but interveen, and was but ſupervenient: And then the Adviſer is not equally puniſhable, eſpecially where the Contrivance is not otherwiſe probable, than by meer preſumptions.

Wilful aſſiſtance alſo in deviſing or practiſing theſe Frauds, is alſo puniſhable by this Act, under which Lawyers comprehend ſuch as tranſact betwixt the Bankrupts and interpoſed Perſons, ſuch as lend him Horſes to flee, if they knew his deſign, and ſuch as carry the Goods of the Bankrupt, or ſuch as reſcue him when he is apprehended, or ſtop his being apprehended, *Strach. de decoct. part.* 2.

The puniſhment appointed by this Act, is, that *they ſhall be repute falſe perſons*: By which is not meant, that they ſhall be puniſhed *tanquam falſarii*, but as cheats; for cheating is a ſpecies of falſehood. And yet if a Bankrupt did call himſelf by the name of a Rich Merchant, thereby to get Credit: or if any treated for him under that name, I conceive they might be purſued *tanquam falſarii*. and might be puniſht accordingly.

They are alſo declared uncapable of all Honours, or Dignities, and Offices, which are not diſtinct puniſhments from infamy, but are the natural conſequences of it. For whoſoever is declared infamous, is *eo ipſo* uncapable of all Honours, Dignities, and Offices.

They are alſo declared uncapable to paſs upon Inqueſts, or Aſſyſes. But this was alſo unneceſſary, for Aſſyſes have a mixt Imployment, and without being either Judges, or Witneſſes, are both, and as to their capacity of Judges, they fell under the foregoing Clauſe, whereby all Bankrupts and their aſſiſtants are declared uncapable to be Judges. And as to their capacity of being Witneſſes, they fell under the ſubſequent Clauſe, whereby ſuch are likewiſe debared from being Witneſſes. And I believe the reaſon why they were ſpecially debarred by this Act, was becauſe our Law looks upon Aſſyſers, as having an imployment diſtinct, and differing from either a Judge, or a Witneſſe, and *medium participationis*, betwixt the two, Though *regulariter*, in our Law, whatever debarrs one from being a Witneſs, debarrs him likewiſe from

from being an Aſſyſer. And there is no ſurer legal topick with us, than an Argument drawn from a Witneſs, to an Aſſyſer: And yet *argumento hujus legis*, an Aſſyſer may be concluded different from both Judge, and Witneſſe, and *medium participationis*, betwixt them.

Bankrupts, and their aſſyſers are likewiſe by this Act, declared uncapable to be Witneſſes, and the reaſon of this excluſion certainly is, becauſe the Law conſiders ſuch as have cheated Creditors, as perſons who would be ready to cheat Judges; that ſuch as have been diſhoneſt in their own Affairs, will never be honeſt in the Affairs of other men.

And whereas this Clauſe, debars them from being Witneſſes, *in-with or out-with Judgement*, by Witneſſes out with Judgement, are meant Witneſſes in Writs, as Bonds, Seaſings, *&c.* But yet it may be doubted, whether in Bonds or ſuch like Writs, this can take place: For there, the Witneſſes are preſumed of Law to be admitted of conſent, which excludes all Objections againſt Witneſſes; and therefore a mans Servant, or Brother, cannot be received judicially as Witneſſes for him; yet they may be, and are ſuſtained as Witneſſes in Bonds granted to him. Nor did I ever hear, a Bond Seaſing, or any other Writ, reduced upon this head, *viz.* That it had only two Witneſſes, one whereof was uncapable to be a Witneſſe, becauſe he was found by the Lords Decreet to have either granted fraudulent Diſpoſitions, or to have been in acceſſion thereto, except he was declared expreſly infamous by the Lords ſentence, as *Maſon* was. Though ſuch an objection ſeems well founded upon this Clauſe of the Act.

Not only ſuch as defraud Creditors, are declared infamous by this Act, but even in declarators founded upon the Common Law, the perſons guilty will be declared infamous; as was found in *Maſons* caſe: And though it was alledged that infamy could not be inferred without an expreſſe Law; yet it was found that this Act impowr'd the Lords, to decide conform to the Canon Law in like caſes, *& à paritate rationis*, and he was thereupon declared infamous.

I have reſerved to be debated in this laſt place, whether by vertue of the laſt Clauſe of this Act, whereby the advyſers of Frauds are to be puniſhed: An Advocat may be examined upon his having given Advice to his Client, to defraud his Creditor: And whether he may be examined againſt his Client, who in conſulting with him, and taking his advice, has made him as his Advocat, privie to the fraud he has committed. And becauſe theſe queſtions are of univerſal conſequence, I am reſolved to conſider them in general termes, both with, and without relation to this Act. For if Advocats may be forced to depone againſt themſelves, or their Clients in this point, or as to any other thing which is the ſubject matter of their conſultations, they may be as well forced in all things; for the parity of reaſon, and the publick intereſt being the ſame. I ſee not why if the Judge may lawfully force them in the one, he may not as well oblige them in all other caſes.

As to the firſt queſtion, it would appear, that an Advocat cannot be obliged to depone upon any thing which may bind a guilt upon himſelf, or which may defame him.

As to the next queſtion, it would appear, that it is the intereſt of the Common-Wealth, to have the truth of all frauds and contrivances detected; and that he who conceals the truth, is as guilty as he who commits a falſhood: But ſuch as attentively and judiciouſly conſider, may probably find themſelves inclined to the contrary opinion, by theſe conſiderations, 1. An Advocat, is by the nature of his imployment tyed to the ſame faithfulneſs that any Depoſitor is: For his Client has depoſitat in his breaſt, his greateſt ſecrets; and it is the intereſt of the Common-Wealth, to have that freedom allowed, and ſecured, without which, men cannot mannage their Affairs, and privat bu-

ſineſs

fineſs: And who would uſe that freedom, if they might be inſnared by it? This were to beget a diffidence betwixt ſuch, who ſhould of all others, have the greateſt mutual confidence in one another; and this will make ignorant men ſo jealous of their Advocats, that they will loſs their privat buſineſs, or ſuccumb in their juſt defence, rather than hazard the opening of their ſecrets to thoſe who can give them no advice, when the caſe is half conceal'd, or may be forced to diſcover them, when revealed. As for inſtance, a Client not knowing that he can be defended againſt a purſuit for murder, by proving it was committed in ſelf defence, will conceal from his Advocat, that he killed at all, leaſt his confeſſion, and his Advocats teſtimony, might be made uſe of againſt him. 2. This might afford to Advocats great matter of prevarication, and might occaſion much prejudice to the Clients, for an Advocat having diſcovered the weakneſs of his Clients Cauſe, might diſcover it likewiſe to his Adverſary: and to cover his prevarication, he might ſuggeſt to his ſaid Adverſary, that he might be examined, and ſo impute the diſcovering of theſe ſecrets, to the cogency of the Law, and not to his own privat inclinations, which made *Rob. Annæus* ſay that *ſi tamen deinceps, Advocatio liceat, Clientum ſecreta pandere, & cauſarum arcana fidei ſuæ commiſſa, palam & publice proferre eaque parum fido pectore effutire. In foro deinceps, non æquitatis cognitio, ſe latrocinium exercebitur: tribunalia murices erunt, quibus litigantium ſimplicitatem undique circumvenire, & imputare licebit. & in judicio non templum themidis, ſed ſpoliarium erit, ſi clientes tacita confeſſionis fide captare, & irretire permittetur.* Whereas now, if a Clients ſecret be diſcovered, he can blame no man but his own Advocats, who are by their Honour and Intereſt, obliged to keep up a Secret, whoſe diſcovery can be aſcribed to none, but them. The deſign of all Probation is to convince the Judge, whereas becauſe of the great Relation that is betwixt an Advocat, and his Client, Law and Experience cannot but preſume, that hardly Truth can be diſcovered this way. And this way rather opens a door to lying, or gives occaſion to a fallacious, and ambiguous concealing of Truth, than helps the diſcovery of it. Upon which account, the Law has ſhunned to force Men to depone againſt themſelves, or Husbands againſt their Wives, or Children againſt their Parents in Criminal caſes. And therefore *Virgil* equals thoſe two, *pulſatuſve parens, & fraus innexa clienti.* Upon which place, *Servius* obſerves that Clients, *quaſi colentes, Patroni, quaſi patres, tantundem ergo eſt Clientem, quantum filium fallere*: And ſuch was the reſpect due to Clients, that the Law allowed leſs Liberty in deponing againſt them, than againſt Blood Relations: and thus M. *Cato* is brought in, by *A Gell.* ſaying, *adverſus cognatos pro cliente teſtatur, teſtimonium adverſus clientem nemo dicit.* And the Law has ſtill been rather inclined to evite the hazard of Perjury, than to follow too far the Intereſt of the Common-wealth; or of privat Parties, ſince God Almighty ſuffers by the one, and men only ſuffer by the other. 5. The Law *L. ult. ff. de teſtibus*, tells us, that *Mandatis cavetur, ut præſides attendant, ne Patroni in cauſa cui Patrocinium præſtiterunt, teſtimonium dicant.* And though *Bartolus*, and ſome others do expone this Law, ſo, as if a Judge were only thereby diſcharged to admit an Advocat to depone for his Client. This Gloſs ſeems to be moſt abſurd, both becauſe the words of the Law are general, and ſince they extend to both caſes, and that no poſterior Law has reſtricted them, there is no reaſon why both ſhould not be equally comprehended: As alſo, Laws are preſumed to be made ſtill againſt the more doubtful caſe; but that Advocats could have been received to depone in favours of their Client, was ſo clearly againſt the whole Analogy of Law, that there needed no ſpecial Law to have been made againſt that caſe: but there was neceſſity to inform Judges, whether Advocats could

could be forced to depone againſt their Clients: Which Gloſs is approved by the learned *Heraldus de rer. judicatur auctor lib. 2, cap. 4.* And conform thereto, the Parliament of *Paris* did find in *December* 1619. that an Advocat could not be oblidged to depone againſt his Client, for clearing of a fraud for which his Client was purſued.

By *Juſtinians* 90. *Novel. Cap.* 8. It is appointed, that though witneſſes may be forced to depone, both in Civil, and Criminal Matters: yet thoſe who had been imployed as Mediators, who are called there, μεσιται, ſhould not be forced to depone as Witneſſes, except both parties conſent; for which no other reaſon can be given: But becauſe the parties had entruſted their ſecrets to them. And accordingly the Senat of *Savoy*, decided the 23, *Nov.* 1596. as *Faber* obſerves, *lib. 4. tit. 15. def.* 56. and the reaſon there given is, *ſolent enim qui litigant, agere liberius cum iſtis mediatoribus, quaſi cum confeſſore; & cauſæ patrono.* Than which nothing can be more convincing, *Idem etiam in proxeneta obſervavit papienſis in form. jur. teſt. num.* 15. And in this the Canon Law agrees with the Civil: for by *Can. ſtatut. Cauſ.* 2. *queſt.* 6. It is ordained, that no Clergy men ſhall be oblidged, or can be compelled to bear Witneſs in a caſe which has been referred to him, by two Laicks. And therefore ſince that truſt is held for Sacred, that the ſecrets even revealed to Arbiters, are not to be extorted from them, much leſs ought an Advocat, to whoſe Patrocinie, his Clients flee, and from whoſe faithfulneſs they ſeek protection, to violat that truſt, & diſappoint that confidence, *ſane id à Romana virtute, & animi magnitudine erat plane alienum.* And how much ſecreſie they all owed to witneſſes, who had got any thing entruſted to them, is clear, *l. 1. §. 30. ff. depoſit. ſi quis tabulas teſtamenti apud ſe depoſitas, pluribus præſentibus legit, ait Labeo, depoſiti actione recte de tabulis agi poſſe, ego arbitror, & injuriarum agi poſſe, ſi hoc animo recitatum teſtamentum eſt, quibuſdam præſentibus, ut judicio ſecreta ejus qui teſtatus eſt divulgarentur.* Nor can there be a ſolid reaſon given, why confeſſors cannot be forced to diſcover the ſecrets revealed to them, *ſub ſigillo confeſſionis*, and yet Advocats ſhall be obliged to reveal what is conſigned to them under the ſacred aſſurance of Truſt, and Secrecy; Eſpecially ſeing that Law which is alledged againſt them, does acknowledge them to be *juris & juſticiæ Sacerdotes l. 1. ff. de juſt. & jur.* Since the Common wealth is more concerned in the ſecrets of Affairs, than in the ſecrets of Devotion; and there are greater temptations to provoke the Truſtee to diſcover the one, than the other: for few can have advantage by what a Confeſſor can reveal, but many could gain by that an Advocat can diſcover.

I muſt here beg leave to repreſent, that the riſe of this great truſt betwixt Clients, and Patrons, was, that firſt when *Rome* was founded, *Romulus* finding the error the *Grecians* had committed, in tyranizing over their Clients, (whom the *Athenians* called θητας, and the *Theſſalians* πενεσταις, he did introduce a mutual Friendſhip and tye betwixt them. And as *Aullus Gellius* obſerves *lib. 5. cap. 13. in officiis apud majores, ita obſervandum eſt, primum tutelæ, deinde hoſpiti, deinde clienti, tum cognato, poſtea affini.* And as *Dioniſ. halic. lib. 2. Ant. Rom.* obſerves, the Patron was obliged, *clienti jura interpretari, & lites pro eo ſuſcipere.* And this was common to both, that they could never accuſe nor bear Witneſs againſt one another κοινας δε αμφοτεροις, ουτε σεσιν, ουτε θεμις, ην κατηγορειν αλληλων, επιδικαις καταμαρτυρειν. And one of the Laws of the twelve Tables was, *patronus ſi clienti fraudem fecerit, ſacer eſto.* So ſacrileglous a thing was it then held, to reveal the Clients ſecrets: but thereafter this mutual dependence, and friendſhip, became ſo ſuſpect to the *Roman* Emperours, that none were allowed to be Patrons, but Lawyers, whoſe power the Magiſtrats needed not ſuſpect; and who were preſumed to be men, ſo legal, and of ſuch integrity, that they would adviſe nothing, but what was juſt. And there-

fo re, betwixt theſe continued the Truſt, and mutual aſſurance that was required betwixt the old Patrons, and their Clients. Though Advocats be novv known to antiquaries, for diſtinction, under the term of *patroni ſecundarii*.

Whereas it is urged, that it is the intereſt of the Common-Wealth, that Truth be diſcovered: To this it is anſwered, that it is indeed the intereſt of the Common-wealth to diſcover the truth, as far as that can be done, in a convenient and lawful way; for it is likewiſe the intereſt of the Common-wealth, not to unſeal the Secrets of privat Perſons, and thereby to render all Truſt, and Commerce ſuſpect. And notwithſtanding of this Argument, the Law has exempted men from deponing againſt themſelves, and againſt many others, who are enumerat. *l.* 4. *ff. de teſtibus*, and of which we have very many inſtances in our Law. *Rei publicæ quidem intereſt, crimina impunita non eſſe, ſed rei publicæ quoque intereſt, pietatis & neceſſitudinis officia ſarta tecta conſervari, ſine quibus nihil ſanctum haberi poteſt, nec inviolatum.* And *Cicero lib.* 3. *de offic.* does elegantly affirm, *non igitur patria præſtabit omnibus officiis, ſed ipſi patriæ conducit, pios cives habere.* Advocats are perſons whoſe Breeding obliges them to admire Juſtice, as Muſicians do Muſick, or as a man does that Countrey in which he lives; and they having given their Oath *de fideli*, at their Admiſſion, to give their Clients Advice according to the Laws: they cannot be preſumed to have adviſed any thing againſt the Law. And it is known, that they offend in this ſo infrequently, if at all; that it may ſeem fitter not to inquire into ſuch caſes, that ſeldom occur, than by inquiry to introduce a jealouſie betwixt Parties, who need ſuch ſtrict Intimacy. And as no Gentleman is deſired to divulge his Friends Secrets, much leſs ſhould the Law require this from Advocats, ſince it has obliged them to imploy Advocats: and to entruſt them with their Secrets. And though men may be ſuſpect, when they debate for their own intereſt, and Advantage, yet what Intereſt can Advocats have here, ſave that of their Clients, for the Client and not the Advocat ſuffers by the diſcovery, and the Common-wealth being only a collective body of Clients; in effect the Common-wealth is prejudged, becauſe Clients are prejudged. And though a Deciſion in the Parliament of *Paris*, be commonly alledged upon this Point, 18. *June* 1580, in the caſe of one *Barbine*, yet all that was there decided, was, *que l' advocat, & conſeil, pourroit eſtre ouy parforme de teſmoinage.* So that the Advocats have there been willing, but were not forced: And the Parties Objections were there reſerved, for the Deciſion bears, *Sauf a la partie, ſes reproches*: So that they were but examined before anſwer. Nor can an Advocat be thus ſaid to conceal truth, ſince he is only ſaid to conceal, who may be forced to depone. And if Clients know, that their Advocats may be forced to depone againſt them, they will keep their ſecrets, or propoſe their doubts under borrowed names; and thus the deſign of finding out truth will be diſappointed. And the Argument altogether eluded, ſome urge, that Advocats may be forced to depone upon the having of their Clients Papers. And that by many Deciſions they have been oft forced to give them up, after full debates: wherein a ſpecial priviledge upon the account of their Imployment has been pretended; from which they infer, that they may be alſo examined upon what paſt betwixt their Clients and them. But to this, the eaſie, and juſt anſwer is, that an Advocat can be no further obliged to deliver his Clients Papers, than the Client himſelf could have been, but neither the one, nor the other could be forced to deliver up any Papers, but ſuch as the Purſuer is in Law allowed an Intereſt in, and in ſo far as they are the Purſuers Papers. Nor are ſuch Papers as ought to be exhibited, to be accounted ſerets, and Advocats are obliged here, not as Advocats, but as ordinary Subjects. But I will not decide this weighty Point.

ACT

ACT XVIII.

Parl. 23. K. *Ja.* 6. 1621.

A Ratification of an Act of the Lords of Council and Seſſion, made in July 1620. *againſt unlawful Diſpoſitions and Alienations made by Dyvours and Baukrupts.*

OUR SOVERAIGN LORD, with Advice and Conſent of the Eſtates, conveened in this preſent Parliament, Ratifies, Approves, and for His Highneſs, and His Succeſſors, perpetually confirmes the Act of the Lords of Council and Seſſion, made againſt Dyvours and Bankrupts, at *Edinburgh*, the 12. Day of *July*, 1620, and ordains the ſame to have, and take full effect, and execution, as a neceſſary and profitable Law, for the weal of all His Highneſs Subjects: Of the which Act the Tenor followeth.

THE LORDS Of Counſel and Seſſion underſtanding, by the grievous and juſt complaints of many of his Majeſties good Subjects, that the Fraud, Malice, and Falſhood of a number of Dyvours and Bankrupts, is become ſo frequent, and avowed, and hath already taken ſuch progreſſe, to the overthrow of many honeſt-mens fortunes, and eſtates that it is like to diſſolve truſt, commerce and faithful dealing amongſt Subjects: Whereupon muſt enſue the ruine of the whole Eſtate, if the godleſs deceits of thoſe be not prevented, and remeided; who by their apparent Wealth in Lands and Goods, and by their ſhow of Conſcience, Credit, and Honeſty; drawing into their Hands upon truſt the of Money, Merchandice, and Goods, of well-meaning and credulous perſons, do no ways intend to repay the ſame: but either to live ryotouſly, by waſting of other mers ſubſtance; or to enrich themſelves, by that ſubtil ſtealth of true mens goods, and to withdraw themſelves and their Goods, forth of this Realme, to elude all execution of Juſtice: and to that effect, and in manifeſt defraud of their Creditors, do make ſimulate and fraudful Alienations, Diſpoſitions, and other ſecurities, of their Lands, Reverſions, Teynds, Goods, Actions, Debts, & Others belonging unto them to their Wives, Children, Kinſmen, Alleyes, and other confident and interpoſed perſons: Without any true, lawful, or neceſſary Cauſe: And without any juſt or true price interveening in their ſaid Bargaines: Whereby their juſt Creditors, and Cautioners, are falſly and godleſly defrauded of all payment of their juſt Debts; and many honeſt Families likely to come to utter ruine.

FOR remeid whereof, the ſaid LORDS, according to the power given unto them by His Majeſtie, and His moſt Noble Progenitors, to ſet down Orders for adminiſtration of Juſtice: meaning to follow and practice the good and commendable Laws, Civil and Canon, made againſt fraudfull alienations, in prejudice of Creditors, and againſt the authors and partakers of ſuch Fraud; Statutes, ordaines, and declares, That in all actions, and Cauſes, depending, or to be intended by any true Creditor, for recoverie of his juſt

Debt; or ſatisfactiou of his lawful action and right: They will decreet and decern, all Alienations, Diſpoſitions, Aſſignations, and Tranſlations whatſoever made by the *Debitor*, of any of his Lands, Teyndes, Reverſions, Actions, Debts, or goods whatſoever, to any conjunct or confident perſon, without true, juſt, aud neceſſary Cauſes, and without a juſt price really payed, the ſame being done after the contracting of lawful Debts from true Creditors: To have been from the beginning, and to be in all times coming, Null, and of none avail, force, nor effect: at the inſtance of the true and juſt Creditor, by way of Action, Exception, or Reply: without further Declarator. And in caſe any of His Majeſties good Subjects (no wayes partakers of the ſaids frauds) have lawfully purchaſed any of the ſaid Bankrupts Lands, or Goods by true Bargains, for juſt and competent prices, or in ſatisfaction of their lawful *Debts*. from the interpoſed perſons, truſted by the ſaid *Dyvours*. In that caſe, the Right lawfully acquired by him who is no ways partaker of the fraud, ſhal not be annulled in manner foreſaid. *But* the Receiver of the Price of the ſaids Lands, Goods, and others, from the Buyer, ſhal be holden and obliſhed to make the ſame forth-coming to the behove of the Bankrupts true Creditors, in payment of their lawful *Debts*. And it ſhal be ſufficient probation of the fraud intended againſt the Creditors, if they, or any of them, ſhal be able to verifie by Writ, or by Oath, of the Party Receiver of any Security from the Dyvour or Bankrupt, that the ſame was made without any true, juſt, and neceſſary cauſe, or without any true or competent *Price*: Or that the Lands and Goods of the Dyvour and Bankrupt being ſold by him who bought them from the ſaid Dyvour, the whole, or the moſt part of the Price thereof was converted, or to be converted to the Bankrupts profit and uſe. Providing always that ſo much of the ſaid Lauds and Goods, or Prices thereof ſo truſted by Bankrupts to interpoſed perſons, as hath been really payed, or aſſigned by them to any of the Bankrupts lawful *Creditors*, ſhal be allowed unto them, they making the reſt forth-coming to the remanent *Creditors*, who want their due Payments. And if in time coming any of the ſaid Dyvours, or their interpoſed partakers of their fraud; ſhal make any voluntary Payment, or Right to any perſon, in defraud of the Lawful, and more timely Diligence of another *Creditor*, having ſerved Inhibition, or uſed Horning, Arreſtment, *Compryſing*, or other lawful mean, duely to affect the Divours Lands, or Goods, or Price thereof to his behove. In that caſe the ſaid Dyvour, or interpoſed perſon, ſhall be holden to make the ſame forth-coming to the *Creditor*, haviug uſed his firſt lawful *Diligence*: who ſhall likewiſe be preferred to the Con-creditor, who being poſterior unto him in Diligence, hath obtained payment by the partial favour of the Debitor, or of his interpoſed Confident: and ſhall have good Action to recover from the ſaid Creditor that which was voluntarily payed in defraud of the purſuers Diligence.

Finally, THE LORDS declares all ſuch Bankrupts and Dyvours. and all interpoſed perſons, for covering or executing their Frauds, and all others, who ſhall give counſel, and wilful Aſſiſtance unto the ſaids Bankrupts, in the deviſing and practiſing of their ſaids Frauds, and godleſs *Deceits*, to the prejudice of their true Creditors, ſhall be reputed and holden Diſhoneſt, Falſe, and Infamous perſons, incapable of all Honours, Dignities, Benefices, and Offices: Or to paſs upon Inqueſts, or Aſſizes: Or to bear witneſs in Judgement, or out-with in any times-coming.

FINIS. ℔ H. W. ℔